Petition

81-1156

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

DEPARTMENT OF DEFENSE, *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a labor organization representing federal employees and their agency-employer lawfully may negotiate the inclusion of seniority provisions within a collective bargaining agreement?*

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* The petitioner is the American Federation of Government Employees, AFL-CIO (AFGE). Respondent in the proceedings before the Federal Labor Relations Authority (FLRA) was the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio. Respondent in the proceedings before the Court of Appeals was the Federal Labor Relations Authority, which was aligned against the petitioner with the following intervenors: Department of Defense; Department of the Air Force, Air Force Logistics Command; and Air Force Logistics Command, Wright-Patterson Air Force Base.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRELIMINARY STATEMENT

Petitioner American Federation of Government Employees, AFL-CIO, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-captioned case (D.C. Cir. No. 80-1358) on July 2, 1981, and the Court's denial, on September 22, 1981, of petitioner's suggestion for rehearing *en banc* and request for rehearing.[1]

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[1] The caption below reads *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority, Department of Defense, et al.* (No. 80-1358). Consolidated with the instant case in the Court of Appeals for purpose of oral argument and opinion were two cases with the following respective captions:

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 659 F.2d 1140 (D.C. Cir. 1981).[2] The decision and order of the Federal Labor Relations Authority (Pet. App. C, at 56a) is reported at 2 FLRA No. 77 (January 31, 1980).

JURISDICTION

The judgment and opinion of the Court of Appeals for the District of Columbia Circuit were entered on July 2, 1981. A timely petition for rehearing with a suggestion that the case be reheard *en banc* was denied on September 22, 1981 (Pet.App. B, at 54a), and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which is styled the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*, (hereinafter "statute") (Pet. App. D, at 108a) and particularly Sections 7101-7103, 7106, and 7117 of the statute.[3] Pet. App. D, at 109a-118a, 123a-124a, 138a-142a.

Department of Defense, Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey v. Federal Labor Relations Authority, American Federation of Government Employees, AFL-CIO (No. 80-1119) and *Department of Defense, Department of the Air Force, Air Force Logistics Command, and Air Force Logistics Command, Wright-Patterson Air Force Base v. Federal Labor Relations Authority, American Federation of Government Employees, AFL-CIO* (No. 80-1351). Only No. 80-1358 is involved in this petition.

[2] Appendix A at 1a in the separately bound companion volume of appendices (hereinafter "Pet. App." followed by the appropriate letter and page number(s)).

[3] Unless otherwise indicated, all section numbers hereinafter refer to provisions of the statute and thus to Title 5 of the United States Code (Supp. III 1979).

STATEMENT OF THE CASE

Petitioner, American Federation of Government Employees (hereinafter "AFGE" or "union"), is a labor union representing federal civilian employees of the Air Force Logistics Command (hereinafter "employer" or "management"). During negotiations between AFGE and the employer, the employer refused to bargain over various AFGE proposals, contending that the proposals were nonnegotiable because they interfered with managerial authority purportedly reserved to the employer under Section 7106(a).[4] Insofar as pertinent to this petition, the proposals, if included in the parties' collective bargaining agreement, would have required *seniority* to be used as the *procedural basis* for assigning employees

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[4] Section 7106(a) is found at Pet. App. D, at 123a-124a. In pertinent part it reads as follows:

> (a) *Subject to subsection (b) of this section,* nothing in this chapter shall affect the authority of any management official of any agency—
>
> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws—
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> (C) with respect to filling positions, to make selections for appointments from—
>
> (i) among properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source; and
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies. . . .

who were otherwise qualified and available for the assignments.[5]

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[5] Four proposals are involved in the instant petition. They are identified as Union Proposals IV, V, VI, and VII, and state as follows:

Union Proposal IV

Section 3. Details to Lower Graded Positions

Details to lower grade positions will be rotated among qualified and available employees in inverse order of seniority.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (hereinafter *Wright-Patterson*), 2 FLRA No. 77 (January 31, 1980), at 7, Pet. App. C, at 65a.

Union Proposal V

Section 4. Loans

B. Selection of employees for loans will be equitably rotated among qualified and available employees with requisite skills in inverse order of seniority.

Id., at 8, Pet. App. C, at 65a.

Union Proposal VI

Section 5. Temporary Assignments Outside the Bargaining Unit

B. Where conditions are less at the receiving location than is provided for by this contract, the employee's wishes to decline such assignment will be considered. Selection for such assignments will be equitably rotated in accordance with Section [3] of this Article.

Id., Pet. App. C, at 66a.

Union Proposal VII

Article 37 Miscellaneous

Section Mobility

Prior to invoking the employment mobility requirement, the employer will seek volunteers from among employees of the same title, series and grade. If there are no volunteers, and the employer is required to unilaterally transfer employees within the unit, the employee with the least amount of seniority shall be selected first. The remaining employees shall be transferred in ascending seniority order.

Id., at 11, Pet. App. C, at 70a.

AFGE appealed the employer's refusal to bargain to the Federal Labor Relations Authority (hereinafter "FLRA" or "Authority"), which subsequently upheld the employer's assertion that the proposals constituted an unlawful infringement upon the employer's authority under Section 7106(a) to assign employees. *Wright-Patterson, supra* note 5, at 7-11, Pet. App. C, at 67a-71a. The FLRA found that the proposals "directly interfered" with the employer's authority to make personnel assignments because the proposals, "in. . . compelling the selection of a particular individual" eliminated the employer's "discretion" in making assignments, an essential element of management rights under Section 7106(a). *Id.*, at 10-11, Pet. App. C, at 68a, 71a.

Upon review by the Court of Appeals under the authority of Section 7123(a), the FLRA's decision was affirmed. *AFGE v. FLRA, Department of Defense et al.*, 659 F.2d 1140 (D.C. Cir. 1981), Pet. App. A, at 1a-53a (hereinafter *AFGE v. FLRA*).[6] In reaching its conclusion, the Court rejected, as had the FLRA, AFGE's contention that the proposals were negotiable as procedures within the meaning of Section 7106(b) and, as such, negotiable even if they affected an employer's authority under Section 7106(a) to assign employees. *Id.*, at 1159-1161, Pet. App. A, at 39a-43a.[7]

AFGE's petition for rehearing with a suggestion that the case be reheard *en banc* was denied. Pet. App. B, at 54a-55a.

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[6] See note 1, *supra*, at 1. The other negotiability cases decided by this Court of Appeals are *National Federation of Federal Employees v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981), and *American Federation of Government Employees v. FLRA*, 652 F.2d 669 (D.C. Cir. 1981).

[7] Section 7106(b) is found at Pet. App. D, at 124a. It reads in pertinent part as follows:

> (b) *Nothing in this section shall preclude any agency and any labor organization from negotiating—*
>
> . . . (2) *procedures* which management officials of the agency will observe in exercising any authority under this section. . . . **[Emphasis supplied]**

REASONS FOR GRANTING THE PETITION

In establishing a system of labor-management relations for the federal service, Congress intended to provide a means for labor and management to bargain collectively over conditions affecting employment.[8] The FLRA, how-

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[8] Section 3 of the Reform Act, *Findings and Statement of Purpose*, provided that certain rights of federal employees should be expressly recognized in statute. In relevant part Section 3 states:

> It is the policy of the United States that—
> . . . (10) the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business, should be specifically recognized in statute.

5 U.S.C.A. § 1101 note.

This basic purpose of the statute and the underlying findings are set forth in Section 7101:

> The Congress finds that—
>
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
>
> (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

Section 7101(a), Pet. App. D, at 109a-110a.

The purpose of the statute is "to *prescribe certain rights* and obligations *of the employees of the Federal Government* and to

ever, through its decision in this case, has undermined this basic purpose of the statute by finding that labor is precluded by Section 7106(a) from bargaining over the procedures whereby already *qualified* and *available* employees will be assigned jobs on the basis of seniority. As construed by the FLRA, Section 7106(a) reserves to the employer the right to complete discretion in assigning a particular employee to a job or position. *Wright-Patterson, supra*, at 10-11, Pet. App. C, at 68a-70a.

While recognizing that AFGE's proposals constitute procedures, the FLRA described the employer's reserved authority to assign an employee under Section 7106(a) as "more than merely the right to decide to assign an employee to a position so that the work of that position will be done." *Id.*, at 10, Pet. App. C, at 68a. The FLRA continued, without explanation as to how it reached its conclusion, by stating:

> An [employer] chooses to assign an employee to a position so that the work of that position will be done. . . . [T]he [employer] retains discretion as to the personnel requirements of the work of the position, *i.e.*, the qualifications and skills needed to do the work, as well as such job-related characteristics as judgment and reliability. Therefore, the [reserved] right to assign an employee [under Section 7106(a)] . . . includes the discretion to determine which employee will be assigned.
>
> *Id.*, Pet. App. C, at 68a-69a.

The FLRA, as stated by the Court of Appeals, reached this conclusion by its implicit application of a "direct interference" standard whereby union proposals are deemed nonnegotiable if they affect, in some undefined

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establish procedures which are designed to meet the special requirements and needs of the Government." Section 7101(b), Pet. App. D, at 110a. [Emphasis supplied]

Fundamental to the specified employee rights is the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees. . . ." Section 7102(2), Pet. App. D, at 111a.

manner, an employer's undefined—yet apparently unrestricted—right to assign employees. *AFGE v. FLRA*, *supra*, at 1159, citing to *Wright-Patterson*, Pet. App. A, at 39a. Not addressed by the FLRA was the question of why a union bargaining proposal that constituted a procedure would be nonnegotiable—as a consequence of applying the "direct interference" standard—in the face of the plain statutory language of Section 7106 which *requires* the negotiation of procedures. Section 7106(a) states: "*Subject to subsection (b) of this section*, nothing in this chapter shall affect the authority of . . . management . . . to . . . assign employees; . . ." [emphasis supplied], and Section 7106(b) states: "*Nothing in this section shall preclude* any agency and any labor organization from *negotiating . . . procedures* which management . . . will observe in exercising [the] authority [to assign employees.]" Section 7106, Pet. App. D, at 123a-124a. [Emphasis supplied]

The Court of Appeals addressed this question by recognizing a tension between what it viewed as the substantive reservation of authority to management under Section 7106(a) and the requirement that procedures relating to the exercise of such authority be negotiated under Section 7106(b). *AFGE v. FLRA*, *supra*, at 1150-1151, 1159, Pet. App. A, at 21a-24a, 38a-39a. In this regard the Court stated:

> Union proposals establishing "procedures" for employee selection illustrate the uncertain boundary between the categories. Selection on the basis of seniority, for example, defines a procedure for the exercise of management's right[s] . . . . But it is equally true that a proposal requiring selection based on seniority both establishes the substantive criterion pursuant to which selection will occur and identifies the particular employee to be chosen. Unless procedure is to be permitted to swallow substance entirely, it therefore becomes necessary to inquire into the range of proposals to be deemed "procedural" within

the contemplation of the statute. *Id.*, at 1151-1152, Pet. App. A, at 22a-23a.

The Court agreed that an interpretive standard is required to delineate the point up to which a procedural proposal constitutes a procedure but beyond which the proposal constitutes unacceptable usurpation of the reserved authority. *Id.*, at 1152, Pet. App. A, at 23a. The FLRA's standard—the "direct interference" test—was affirmed by the Court as consistent with the language and intent of the statute. *Id.*, at 1159-1160, Pet. App. A, at 40a-43a.[9]

The Court of Appeals, AFGE submits, erred in affirming the Authority's decision. While relying upon the recognized statutory canons ordinarily requiring deference to an agency's decision on review (*Id.*, at 1161, Pet. App. A, at 43a-44a), the Court ignored the fundamental inconsistency of the FLRA decision with the overall statutory design established by Congress. In this respect the Court's affirmance is flawed. See *e.g.*, *American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 85 S.Ct. 955 (1965) (NLRB's conclusion that an employer commits an unfair labor practice by locking out employees after negotiation impasse reversed by the Court after scrutinizing the overall statutory scheme of the National Labor Relations Act and concluding that, while the Board's conclusion was not necessarily unreasonable, the decision was fundamentally inconsistent with the NLRA's structure.)

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[9] In the consolidated case (note 1, *supra*, at 1) *Department of Defense, Army-Air Force Exchange Service and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, N.J. v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) (hereinafter *Dept. of Defense v. FLRA*) the Court affirmed the FLRA's use of a different standard under which proposals structured in procedural language would be negotiable unless the effect of their adoption would be to stop management from "acting at all." *Dept. of Defense v. FLRA*, *supra*, at 1153-1158, Pet. App. A, at 24a-36a.

The plain language of the statute strongly supports AFGE's position that Section 7106 establishes a hierarchy in which the terms of subsection (b) hold priority over those of subsection (a). *Dept. of Defense v. FLRA*, *supra*, at 1153, Pet. App. A, at 25a. The establishment of this hierarchy in Section 7106 is an important difference between Executive Order 11491, which governed federal labor-management relations prior to 1979, and the Reform Act. *Id.*, at 1158, Pet. App. A, at 37a. Moreover, a major part of the balancing of federal management and federal employee unions' interests envisioned by the statute involves *broad recognition and protection of employee interests through collective bargaining over "expansively defined" conditions of employment. Id.*, at 1147, Pet. App. A, at 9a-10a. [Emphasis supplied][10] Yet, the Court of Appeals affirmed the FLRA's adoption of a standard which effectuates a much narrower recognition and protection of employee rights, and a much more constrictive definition of conditions of employment, than intended by Congress. Since virtually any procedural requirement "directly interferes" with management authority in some way, the impact of the Authority's "direct interference" decision is to subordinate Section 7106(b) to Section 7106(a) so thoroughly as to read the former effectively out of the statute. This is a result antithetical to the statute's unequivocal mandate.

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[10] Section 7103(a)(14) defines "conditions of employment":

> "[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute.

Pet. App. D, at 115a.

Furthermore, the FLRA's decision that labor and management cannot lawfully negotiate seniority provisions within their agreements, and the Court of Appeals affirmance of that proposition, represent an unjustified departure from labor relations as conducted under the National Labor Relations Act and analogous state and municipal legislation.[11] In this departure the decision represents a determination of severe consequence to the basic parameters of collective bargaining within the federal service. As such, the FLRA's decision warrants review by this Court and its analysis of the issues. In this regard, it would not be an exaggeration to suggest that this decision, when viewed in the context of the labor relations framework established by Congress for federal employees, presents a more basic and significant issue than cases arising under the NLRA posing questions as to whether certain matters are statutory subjects of bargaining, *e.g.*, *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718 (1958) (union may not require an agreement to bargain on such voluntary subjects as a precondition to entering or continuing collective bargaining on mandatory subjects), *Fibreboard Paper Products Corp v. NLRB*, 379 U.S. 203, 85 S.Ct. 398 (1964) (subject generally considered to be a prerogative of management, such as decision to contract out work formerly done on the premises by employees, can become a mandatory subject of bargaining where employees are deprived of their employment and decision is suitable for reduction at the bargaining table), and *Order of R. R. Telegraphers v. Chicago and N.W. Railway Co.*, 363 U.S. 330, 80 S.Ct. 761 (1960) (employer failed to bargain concerning attempt to terminate existing jobs which was a mandatory subject; participation by the union in the decision did not constitute the usurping of managerial prerogatives).

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[11] This departure is particularly unreasonable in view of the express reference in Section 7101 to "experience in private and public employment" on which the purpose of the statute is based. See note 8, *supra*, at 6.

For these reasons, together with the reasons stated below, review by this Court is justified.

1. The legislative history of the statute reveals a Congressional intent contrary to the results effectuated by the FLRA's decision.

Neither the plain language of the statute, nor its legislative history as discussed below, supports the conclusions reached by the Authority in its decision. The legislative history evidences a strong recognition by Congress that collective bargaining would be hamstrung by the very type of expansive FLRA interpretation of Section 7106(a) evinced in the decision at hand. The statute represents Congressional rejection of the management-oriented decisionmaking that was prevalent under the predecessor scheme of labor relations within the federal service.

With regard to management rights, Congressman Udall—in the sectional analysis accompanying the substitute bill which he sponsored and which became law—stated:

> [T]he "Management rights" section . . . is to be treated narrowly as an exception to the general obligation to bargain over conditions of employment.
>
> 125 Cong. Rec. H9634 (daily ed. Sept. 13, 1978).[12]

Relative to the relationship between Section 7106(a) ("substance") and Section 7106(b) ("procedure"), the Udall sectional analysis provides:

> [While] management has the reserved right [among others] . . . to "remove" an employee, . . . that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management right to "remove" would in no way affect the employees' right to appeal the decision . . .

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[12] As *reprinted* in House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (hereinafter *Legis. Hist.*), 924.

through the procedures set forth in a collective bargaining agreement.

Id.

As further evidence of Congressional intent, statements by Representatives Ford and Clay, who, along with Representative Udall, were managers for the Labor-Management bill in the House, are instructive and entitled to substantial weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295, 2304 (1976). As stated by Representative Clay:

> An essential component of the new labor-management program mandated by [the statute] is the interplay between the obligation to bargain in good faith over conditions of employment and the reserved management rights set forth in section 7106.
>
> * * * *
>
> As the sectional analysis makes clear, the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good faith. . . .
>
> If the new authority is faithful to these interpretative guidelines [within the legislative history], the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations. . . .
>
> 124 Cong. Rec. H9637-9638 (daily ed. Sept. 13, 1978), *Legis. Hist.*, 931-933.

Congressman Ford's remarks evidence similar concerns:

> Too often the [FLRA's predecessor] interpreted the management rights clauses so broadly as to stifle an attempt by both management and employees to address commonly recognized problems. . . .
>
> A principle goal in revising the management rights clause is to change the current situation and, when-

ever possible, encourage both parties to work out their differences in negotiations. . . .

[T]he committee . . . intended . . . that the listed management rights were to be narrowly construed exceptions to the general obligation to bargain . . . and that section 7106 "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal." [citation omitted]

[T]he general principles that we embodied in the [Udall] substitute's management rights clause [include:]

> the premise that the [employer] bears a heavy burden of establishing that a matter relevant to terms and conditions of employment is nevertheless removed from the scope of bargaining. . . . Where the "nonnegotiability" argument is strained, or where it is presented as a conceivable secondary or tertiary result of a union proposal . . . it will be rejected. . . . [citation omitted]

* * * *

The concept of negotiability is and must be a dynamic and growing one. If not, federal sector labor relations must fail because the energies of management and labor will be diverted from consideration of important labor relations problems to the litigation of the scope of exceptions of the general bargaining obligation.

124 Cong. Rec. H9648, 9649 (daily ed. Sept. 13, 1978), *Legis. Hist.*, 953-956.

In the context of the legislative history, therefore, the decision of the FLRA constricting the scope of bargaining cannot be reconciled with the Congressional intent of Section 7106.[13]

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[13] In reporting a management rights provision that was modeled after Section 7106—Section 1105 of the Foreign Service Act, 22 U.S.C.A. § 4105 (1981 Pocket Part)—as the Court of Appeals noted:

2. The decision by the FLRA denies federal employees a basic employee right—seniority—protected and universally recognized in the private sector under the National Labor Relations Act and in the non-federal public sector under analogous state and municipal statutory authority.

The decision by the Authority not only conflicts with the purposes of the statute (note 8, *supra*, at 6-7) and statutory definitions of conditions of employment (Section 7103(a)(14), Pet. App. D, at 115a) and collective bargaining (Section 7103(a)(12), Pet. App. D, at 114a-115a), but also ignores the primary importance of seniority in private and non-federal public labor relations. Without any discussion whatsoever the FLRA has virtually extinguished in the federal sector what is an important, pervasive subject of collective bargaining elsewhere.

"[O]ne of the principal purposes for entering into a collective bargaining agreement is usually to secure for the employees the prized right of seniority in case of lay-off or promotion." *Cournoyer v. American Television Co.*, 249 Minn. 577, 83 N.W. 2d 409, 412 (Minn. Sup. Ct. 1957). Seniority has become so basic to collective bargaining that its principal "is embodied in virtually every collective bargaining agreement." Aaron, *Reflections On The Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1534 (1962). Indeed, "[s]ince seniority

---

the House-Senate conference not only urged adoption of an "acting at all" standard, it cited Section 7106 . . . as precedent for its decision to do so:

> [W]ith respect to negotiated procedures the [House and Senate] bills are consistent and reflect the conference report to accompany the Civil Service Reform Act of 1978 (S. Rept. 95-1271, p. 158), which stated that the standard for determining whether a proposal is nonnegotiable is whether it "prevent[s] *the agency from acting at all.*" * * * [citation omitted]

The conference report was "agreed to" by both the full Senate and the full House. [citations omitted]

Dept. of Defense v. FLRA, *supra*, at 1157, Pet. App. A, at 35a.

is so obviously a condition of employment—and is a condition commonly existing under union contracts [citing to *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)], litigation questioning its mandatory status has been minimal." *The Developing Labor Law* (C. Morris ed. 1971), p. 406. Among the many aspects of the employment relationship in which seniority provisions are included in negotiated agreements are "promotions, layoffs, rehiring, shift preference, transfers, vacations, days off, and overtime work assignment." F. Elkouri and E. A. Elkouri, *How Arbitration Works* (3d ed. 1976), p. 555. The reasons for seniority's prevalence include a growing belief that (1) long-service workers, as a matter of equity, are entitled to greater security and superior benefits; (2) its use provides an objective mechanism for decisions arising in the work-place, and (3) it furnishes a basis for setting entitlement to employment benefits. See Slichter, Healy and Livernash, *The Impact of Collective Bargaining On Management* (Brookings Institute, 1950), pp. 104-115, 157-161.

With regard to seniority-based provisions of bargaining agreements, other tribunals with adjudicative roles in private and non-federal public sector labor relations have had little difficulty harmonizing statutory requirements of management rights with the basic right of employees to bargain over conditions of employment.[14] If this Court decides to grant certiorari and determines the merits of the FLRA's decision, the Court would have the opportunity to provide crucial guidance as to the scope of collective bargaining in the federal sector and thereby

---

[14] For example, in holding that a seniority-based promotion clause was a mandatory subject of bargaining, the Wisconsin Supreme Court observed that "[a] requirement that the [police] chief promote the most senior qualified applicant merely restricts the discretion that would otherwise exist."

Glendale Professional Policemen's Ass'n v. City of Glendale, 83 Wis. 2d 90, 264 N.W. 2d 594 (1978).

to facilitate the conduct of federal labor relations.[15] In view of the limited number of subjects in federal sector collective bargaining (wages, hours, benefits, and other traditional collective bargaining subjects are set by statutes), petitioner submits that the constriction of the definition of negotiable conditions of employment resulting from the FLRA decision upsets the "balance of statutory purposes . . . evidenced" in critical part in the Reform Act's "broad" recognition and protection of "the interest of employees in protecting their interests through collective bargaining." *AFGE v. FLRA*, *supra*, at 1145-1147, Pet. App. A, at 9a-10a.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1981

[15] This Court would also have the opportunity to consider whether the distinction found by the FLRA between Union Proposal III—a seniority-based proposal found negotiable because it provided by its terms a management option to utilize competitive procedures instead of seniority-based procedures in certain details of employees—and the nonnegotiable proposals is arbitrary and capricious, since management *always* has the option of using either competitive procedures in filling positions or the details, loans, transfers, or temporary assignments which are the subjects of the instant proposals. See *Wright-Patterson*, *supra*, at 7-11, Pet. App. C, at 65a-70a.

Appendix

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81-1156
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

DEPARTMENT OF DEFENSE, *et al.*,
Intervenors.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1119

DEPARTMENT OF DEFENSE,
ARMY-AIR FORCE EXCHANGE SERVICE,
and ARMY-AIR FORCE EXCHANGE SERVICE,
DIX-MCGUIRE EXCHANGE, FORT DIX, NEW JERSEY,
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, INTERVENOR

No. 80-1351

DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE AIR FORCE,
AIR FORCE LOGISTICS COMMAND,
and AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, INTERVENOR

No. 80-1358

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

DEPARTMENT OF DEFENSE, *et al.*, INTERVENORS

Petitions to Review and Cross-Application to Enforce Orders of the Federal Labor Relations Authority

---

Argued April 1, 1981

Decided July 2, 1981

Howard S. Scher, Attorney, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General at the time the briefs were filed, and *William Kanter*, Attorney, Department of Justice, were on the brief, for petitioners in No. 80-1119.

Douglas N. Letter, Attorney, Department of Justice, with whom *Thomas S. Martin*, Acting Assistant Attorney General at the time the briefs were filed, and *William Kanter*, Attorney, Department of Justice, were on the brief, for petitioners in No. 80-1351 and intervenors in No. 80-1358.

William J. Stone, with whom *James R. Rosa* and *Charles A. Hobbie* were on the brief, for American Federation of Government Employees, petitioner in No. 80-1358 and intervenor in Nos. 80-1119 and 80-1351.

Steven H. Svartz, Attorney, Federal Labor Relations Authority, with whom *Elizabeth Medaglia*, Associate Solicitor, Federal Labor Relations Authority, was on the brief, for respondent. *Judith P. Wilkenfeld*, Attorney,

Federal Labor Relations Authority, entered an appearance for respondent.

Janet Cooper and *Catherine Waelder* were on the brief for *amicus curiae* National Federation of Federal Employees in No. 80-1119, urging affirmance.

Before ROBINSON, *Chief Judge*, WRIGHT, *Circuit Judge*, and VAN PELT,* *Senior District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Senior District Judge VAN PELT concurs except as to Proposal III, as to which he would reverse.

WRIGHT, *Circuit Judge*: The Civil Service Reform Act of 1978 [1] requires management officials of the federal agencies to bargain with employee representatives over conditions of employment.[2] But the duty to engage in collective bargaining is not absolute.[3] Section 7106 of

---

* Of the United States District Court for the District of Nebraska, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

[1] Pub. L. No. 95-454, 92 STAT. 1111 (1978). The issues in this case all involve the Labor-Management Relations chapter, 5 U.S.C. § 7101 *et seq.* (Supp. III 1979), which is one title (Title VII) of the Civil Service Reform Act. Unless otherwise indicated, all section numbers in this opinion refer to provisions of Title VII of the Reform Act and thus to Title 5 of the United States Code (Supp. III 1979).

[2] Section 7114(a)(4), 5 U.S.C. § 7114(a)(4), requires the parties to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. The duty to bargain extends generally to "conditions of employment," *see* 5 U.S.C. § 7102, a term that is broadly defined by § 7103(a)(14), 5 U.S.C. § 7103(a)(14).

[3] The statute clearly imposes no duty to bargain over proposals that would be "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117. Section 7106, the "management rights" section of the Reform Act, also enumerates certain areas of management authority regarding which management either cannot, *see* 5 U.S.C. § 7106(a), or need not, *see* 5 U.S.C. § 7106(b)(1), bargain.

the Reform Act enumerates certain reserved rights of management that cannot be lawful subjects of negotiation.[4] It is permissible to bargain over the "procedures" by which those rights are exercised, but not over the substance of the rights themselves.

These consolidated cases[5] raise important questions about the scope of management's duty to bargain under Section 7106. The issue arose when agency management refused to bargain over various union proposals for the

---

[4] 5 U.S.C. § 7106(a).

[5] Three appeals are consolidated for decision. They arise from two cases decided by the Federal Labor Relations Authority (FLRA or Authority): *American Federation of Government Employees, AFL-CIO Local 199 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey* (hereinafter *Dix-McGuire*), 2 FLRA No. 16 (Nov. 29, 1979), and *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio* (hereinafter *Wright-Patterson*), 2 FLRA No. 77 (Jan. 31, 1980). In No. 80-1119, *Dep't of Defense, Army-Air Force Exchange Service and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, N.J. v. FLRA*, petitioner (the agency) challenges a single ruling of nonnegotiability rendered by the FLRA in *Dix-McGuire*. The American Federation of Government Employees, AFL-CIO (AFGE or union) appears as an intervenor, arguing in support of the FLRA's decision below. Consolidated with No. 80-1119 in this decision are Nos. 80-1351 and 80-1358, both of which present challenges to negotiability determinations given in *Wright-Patterson*. In No. 80-1351, *Dep't of Defense et al. v. FLRA*, petitioners (the agency) challenge the Authority's decision that two union proposals were proper subjects of negotiation under the statute. AFGE is an intervenor, once again arguing in support of the FLRA rulings under review. In No. 80-1358, *AFGE, AFL-CIO v. FLRA*, it is the union that seeks our review of FLRA rulings that five other *Wright-Patterson* proposals were nonnegotiable. The Department of Defense *et al.* appear as intervenors. The briefs for the various parties are hereinafter cited by reference to their docket numbers.

terms of collective bargaining agreements. The negotiability of each of the proposals was considered in the first instance by the Federal Labor Relations Authority (FLRA or Authority). The Authority held three of the contested proposals to be mandatory subjects of collective bargaining; it found five to be excluded from the statutory obligation to bargain under the terms of Section 7106. We affirm the Authority in each of its holdings.

I

Labor relations within the federal civil service are governed by Title VII of the Civil Service Reform Act of 1978. Because these cases are among the first under that statute, *see Nat'l Federation of Federal Employees v. FLRA*, —— F.2d —— (D.C. Cir. No. 80-1708, decided May 29, 1981); *American Federation of Gov't Employees v. FLRA*, —— F.2d —— (D.C. Cir. No. 80-1969, decided May 29, 1981), it might be useful to sketch the background against which we consider the issues presented.

A.

The questions before us arise on appeal from two decisions by the Federal Labor Relations Authority.[6] An independent agency within the Executive Branch,[7] the FLRA was established under Reorganization Plan No. 2 of 1978.[8] It was continued under and administers the labor relations section of the Civil Service Reform Act, Title VII. Its role is analogous to that of the National Labor Relations Board under the National Labor Relations Act.[9] The Civil Service Reform Act invests the Authority with both rulemaking and adjudicatory powers.[10] Among its specific mandates, the FLRA possesses

---

[6] *See* note 5 *supra*.

[7] *See* 5 U.S.C. § 7104.

[8] 3 C.F.R. 323, 327 (1979), *reprinted in* 5 U.S.C. app. at 357, 359 (Supp. III 1979).

[9] 29 U.S.C. § 151 *et seq.* (1976).

[10] 5 U.S.C. § 7105.

authority to determine appropriate units for labor organization and bargaining,[11] to conduct representation elections,[12] to adjudicate unfair labor practice complaints,[13] and to resolve exceptions to arbitrators' awards.[14] With only minor exceptions, final orders of the Authority are subject to review in the Courts of Appeals.[15] The Authority may petition any appropriate Court of Appeals for enforcement of its orders.[16]

The FLRA has assumed its role as a successor agency to the Federal Labor Relations Council. Functioning pursuant to Executive Order 11491,[17] issued by President Nixon in 1969, the Council was composed of three federal management officials: the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget. Its decisions were not subject to judicial review. The general framework for collective bargaining administered by the Council dated from 1962, the year in which Executive Order 10988,[18] issued by President Kennedy, initially established a program of labor-management negotiations for federal employees.

B.

The legislative history indicates that Title VII of the Civil Service Reform Act was intended to serve a variety of purposes. Congress sought at least in part to strengthen the authority of federal management to hire

---

[11] 5 U.S.C. § 7105(a)(2)(A).

[12] 5 U.S.C. § 7105(a)(2)(B).

[13] 5 U.S.C. § 7105(a)(2)(G).

[14] 5 U.S.C. § 7105(a)(2)(H).

[15] 5 U.S.C. § 7123(a).

[16] 5 U.S.C. § 7123(b).

[17] 3 C.F.R. 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7101 at 258 (Supp. III 1979).

[18] 3 C.F.R. 521 (1959-1963 Compilation).

and to discipline employees.[19] Representative Udall, who drafted the amendment that essentially became the labor relations chapter of the Reform Act, said explicitly that "one of the fundamental purposes of this bill is to make it easier and not harder to discharge incompetent employees * * *."[20] But the Reform Act also aimed to strengthen the position of employee unions in the federal service. The statutory statement of congressional purpose asserts that "protection of the right of employees to organize [and] bargain collectively" "safeguards the public interest," "contributes to the effective conduct of public business," and "facilitates and encourages the amicable settlements of disputes * * *."[21] Consistent with this view, the Reform Act replaced the Federal Labor Relations Council, which had been criticized as "defective" because its members "come exclusively from the ranks of management,"[22] with an independent and

---

[19] *See, e.g.*, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 4 (1978); S. Rep. No. 95-969, 95th Cong., 2d Sess. 4 (1978). Although Title VII of the Reform Act was amended on the House floor to substitute language drafted by Representative Udall, *see* 124 Cong. Rec. H9653 (daily ed. Sept. 13, 1978), the Udall amendment, which was ultimately enacted into law, did not alter this basic aim. *See, e.g.*, 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall) ("Major management rights to hire and fire and determine staffing are preserved in my amendment."); 124 Cong. Rec. S17083 (daily ed. Oct. 4, 1978) (remarks of Sen. Percy explaining House-Senate conference report accepting Udall amendment) ("At the core of the legislation, the conference agreed to provisions expediting and easing the process for disciplining and removing unfit Federal employees.").

[20] 124 Cong. Rec. H9372 (daily ed. Sept. 11, 1978).

[21] 5 U.S.C. § 7101.

[22] Message from the President Transmitting Proposal to Reform the Federal Personnel Management System Through Reorganization Plan No. 2 of 1978, H.R. Doc. No. 95-341, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 5 U.S.C. app. 357, 360 (Supp. III 1979).

bipartisan FLRA. There was no suggestion that employee unions might not seek procedural protections against arbitrary or mistaken employee discharges. On the contrary, Representative Udall stressed that he intended his amendment "to meet some of the legitimate concerns of the Federal employee unions as an integral part of what is basically a bill to give management the power to manage and the flexibility that it needs." [23] Other members articulated nearly identical sentiments during the floor debates. Endorsing the Udall amendment, Representative Ford agreed that "while considering the increased powers for management, we always had in mind that we would put together a totality here * * * that we hoped would represent a fair package of balanced authority for management, balanced with a fair protection for at least the existing rights the employees have." [24]

The balance of statutory purposes is evidenced, not only in the legislative history, but in the text of the Reform Act. On the one side, Section 7106(a) purports to define certain reserved rights of management:

> **§ 7106. Management rights**
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws—
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or

---

[23] 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978).

[24] 124 Cong. Rec. H9647 (daily ed. Sept. 13, 1978).

take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.[25]

It is agreed that a union proposal intruding on protected management rights is not a proper subject of collective bargaining under the Act.[26]

On the other side, the interest of employees in protecting their interests through collective bargaining is broadly recognized and protected. Federal management representatives are required to bargain in good faith over "conditions of employment"—a term that is expansively defined, subject only to express statutory exceptions, to include "personnel policies, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *."[27] Even with regard to reserved management rights, the Act authorizes collective bargain-

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[25] 5 U.S.C. § 7106(a).

[26] Even the union implicitly concedes that this is so. *See* brief for intervenor AFGE, No. 80-1119, at 8 ("The broad right to collective bargaining, like private sector practice, does not extend to essential management prerogatives, commonly referred to as 'management rights.' ").

[27] 5 U.S.C. § 7103(a)(14).

ing over the "procedures which management officials of the agency will observe in exercising [their] authority * * *."[28] Nor is the duty to bargain one that is lacking in practical effect. Although federal employees have no legal right to strike, management must make good faith efforts to reach agreement with employee representatives.[29] Where bargaining fails to produce an accord, the Act provides for binding arbitration by the Federal Service Impasses Panel,[30] or, if both parties agree and the procedure is approved by the Panel, by an outside arbitrator.[31]

The possibility of binding arbitration and imposed settlement lends importance to the question whether a union contract proposal is a mandatory subject of collective bargaining under the Reform Act.[32] Procedures

---

[28] 5 U.S.C. § 7106(b)(2). Section 7106(a), the "management rights" section, is by its own terms "[s]ubject to subsection (b) * * *." 5 U.S.C. § 7106(a).

[29] 5 U.S.C. § 7114(a)(4).

[30] 5 U.S.C. §§ 7119(b)(1), 7119(c)(5)(B)(iii).

[31] 5 U.S.C. § 7119(b)(2).

[32] The Defense Department has stressed to this court that the Federal Service Impasses Panel frequently makes its arbitration decisions pursuant to a "final-offer selection" procedure. *See* reply brief for petitioners Department of Defense *et al.*, No. 80-1119, at 2-3. Under this procedure the Panel will not itself attempt to structure a compromise of conflicting aims or positions, but will choose between the "final offers" submitted by the parties. Thus, the Department argues, any proposal held negotiable by the FLRA may in fact be imposed on the parties by the Impasses Panel, which, it contends, has no authority to undertake an independent review of the conformity of the proposals before it with applicable law and regulations. *See id.*

Section 7117(c) of the Civil Service Reform Act expressly imposes on the FLRA a duty to determine the negotiability of disputed proposals properly brought before it. We therefore

for resolving this questions are provided by Section 7117 [33] and by regulations issued by the FLRA.[34]

Negotiability disputes characteristically arise when the union submits a proposal for inclusion in a collective bargaining agreement. If the agency believes that the proposal is contrary to law or applicable regulation, or is otherwise nonnegotiable under the statute, it may inform the union of its refusal to negotiate. Section 7117 thereupon provides a right to appeal the agency's determination of nonnegotiability to the FLRA.[35] The FLRA is required to decide the negotiability issue at the earliest possible date, issuing a written decision containing spe-

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agree with the Defense Department that the FLRA must determine whether union proposals, as they are actually drafted, satisfy the negotiability standards of the statute—standards that include consistency with applicable law and regulations. 5 U.S.C. § 7117(a)(1). The Authority may not approve a proposal not presently consistent with law by invoking the theory that the proposal will subsequently be rendered legally acceptable either by the parties or by the Impasses Panel. But we do not understand the FLRA to argue otherwise. Moreover, because the issue is not presented by the facts of the case before us, we express no opinion on the statutory authority of the Impasses Panel to determine for itself the legality of a union proposal under applicable law or regulations.

[33] 5 U.S.C. § 7117.

[34] *See* 5 C.F.R. § 1414 (1980).

[35] *See* 5 U.S.C. § 7117. If the union wishes to appeal, it first obtains a written allegation from the agency explaining its reasons for holding the proposal nonnegotiable. 5 C.F.R. § 2424.3 (1980). The union then files a petition seeking FLRA determination of the negotiability issue. 5 C.F.R. § 2424.4 (1980). The agency is served with a copy of this petition, to which it may respond with a statement setting forth reasons supporting its position. 5 C.F.R. § 2424.6(a)(2) (1980). The union then has a final right of rebuttal. 5 C.F.R. § 2424.7 (1980).

cific reasons for sustaining or setting aside the agency's allegation of nonnegotiability.[36] The FLRA's decision addresses only the negotiability of the union proposal under the Reform Act. It neither considers the merits of the proposal nor orders the agency to agree to it. If the proposal is found negotiable, the Authority holds only that the agency must bargain in good faith upon the union's request.

II

The issues before us in these cases stem from FLRA decisions concerning the negotiability of eight union proposals. They come to us in three separate appeals, involving two decisions issued by the Authority, which this court has consolidated for review.[37]

A. *No. 80-1119*, Dix-McGuire

No. 80-1119 comes before us on a petition filed by the Department of Defense. In the course of its contract negotiations with the Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey (the agency), the American Federation of Government Employees, AFL-CIO, Local 1999 (the union) advanced the following proposal as a basis for collective bargaining:

> In the event of a disciplinary suspension or removal, the grievant will exhaust the review provisions contained in this Agreement before the suspension or removal is effectuated, and the employee will remain in a pay status until a final determination is rendered.[38]

---

[36] 5 U.S.C. § 7117(c)(6); *see* 5 C.F.R. § 2424.10 (1980). Although § 7117(b)(3) permits the Authority to hold a hearing before making a negotiability determination, none is ordinarily conducted. Brief for respondent FLRA, No. 80-1119, at 9 n.7.

[37] *See* note 5 *supra*.

[38] *Dix-McGuire*, *supra* note 5, at 1, *reprinted in* Joint Appendix in No. 80-1119 (hereinafter *Dix-McGuire* JA) at 29.

The agency responded that the proposal was nonnegotiable. If adopted, it said, the proposed contract term would "so unreasonably delay and impede the exercise of the reserved right to suspend and separate employees as to negate that right and, hence, violates . . . 5 U.S.C. 7106(a)(2)(A)." [39] The union appealed this determination to the Authority.

Rejecting the management claim, the FLRA held the procedure to be negotiable. The FLRA based its decision on Section 7106(b)(2), which provides that the enumeration of reserved management rights contained in Section 7106(a) "does not preclude the negotiation of procedures which management will observe in exercising those rights." [40] The Authority construed this section to license collective bargaining over proposed "procedures" for the exercise of management rights "except to the extent that * * * negotiations would prevent agency management from acting at all." [41] Although the arbitration process provided in the union proposal did not contain an express time limit, the FLRA found that the agency had failed to establish that its adoption would make it impossible for the agency to implement disciplinary actions.[42] The proposal was therefore negotiable under the "acting at all" standard adopted by the Authority.

B. *No. 80-1351*, Wright-Patterson

There are two proposals at issue in No. 80-1351, brought before us by the Department of Defense. Like

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[39] Brief for respondent FLRA, No. 80-1119, at 10 (*quoting* agency allegation of nonnegotiability filed with FLRA) (ellipsis in original).

[40] *Dix-McGuire*, *supra* note 5, at 2, *Dix-McGuire* JA at 30.

[41] *Id.* at 4, *Dix-McGuire* JA at 31.

[42] *Id.* at 4, *Dix-McGuire* JA at 32.

those presented for review in No. 80-1358, these proposals were submitted by the American Federation of Government Employees, AFL-CIO (the union) during contract negotiations between the union and the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (the agency). The agency contended that a substantial number of the proposals would infringe protected management rights and therefore lay beyond the scope of the duty to bargain. Pursuant to 5 U.S.C. § 7117(c), the union appealed this allegation of nonnegotiability to the FLRA. Of the 16 proposals contested before the Authority, the FLRA held that eight were negotiable, that seven were not, and that one was partly negotiable and partly nonnegotiable.[43] The two proposals at issue in No. 80-1351 are union Proposals III and XIV, both of which were held negotiable by the FLRA.

Proposal III provides:

> *Section 2. Details to Higher or Same Graded Positions*
>
> B. Unless the employer decides to use competitive procedures as outlined in Article —— (Promotions), temporary assignment to higher or same grade/different duty positions shall be offered to qualified and available employees with requisite skills on the basis of seniority within the lowest organizational segment. If senior employees decline and it is necessary to detail an employee, the least senior employee shall be assigned.[44]

In contesting the negotiability of the proposal the Defense Department argued that its adoption would infringe reserved management rights. According to the agency's

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[43] *Wright-Patterson, supra* note 5, *reprinted in* Joint Appendix in Nos. 80-1351 & 80-1358 (hereinafter *Wright-Patterson* JA) at 177.

[44] *Id.* at 7, *Wright-Patterson* JA at 183.

construction, Section 7106(a)(2)(A) reserves a management right to make personnel assignments that may not be limited; management, it says, must retain full discretion to assign employees on any basis that it chooses.[45] The FLRA rejected this argument. The Authority recognized that the right to make assignments encompasses more than the narrow right to decide whether or not to assign that particular employee identified by some agreed set of procedures: "Under section 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position, *i.e.*, the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned."[46] Nevertheless, the Authority found the union proposal to be negotiable. The reason lay in the proposal's authorization of competitive selection procedures.[47] As defined in the *Federal Personnel Manual*, competitive procedures preserve "management's right to select or not select from among a group of best qualified candidates."[48] According to the FLRA, this reservation of management discretion brought the union proposal within the statu-

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[45] *See* Department of Defense Statement of Position with Respect to the Negotiability of Certain Proposals Submitted by the American Federation of Government Employees, AFL-CIO in Negotiations with the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (May 17, 1979), at 8-25, *Wright-Patterson* JA at 19-27.

[46] *Wright-Patterson, supra* note 5, at 10, *Wright-Patterson* JA at 186.

[47] *Id.*

[48] *Federal Personnel Manual*, ch. 335, subch. 1-4, Requirement 4, *quoted in Wright-Patterson, supra* note 5, at 10 n.19, *Wright-Patterson* JA at 186 n.19.

tory duty to bargain: "Only if the agency chooses not to use competitive procedures must it select [an] individual on the basis of seniority. Because Union Proposal III preserves in this manner the agency's discretion to select, the proposal does not directly interfere with the agency's basic right to assign employees under section 7106(a)(2)(A) of the Statute." [49]

Union Proposal XIV dealt with temporary promotion to "encumbered" positions:

> When an employee is temporarily assigned to an encumbered, but temporarily vacant[,] bargaining unit position of a higher grade for 30 days, the employee will receive the rate of pay for the higher position to which assigned, commencing on the 31st day.[50]

The agency challenged this proposal as incompatible with its right under Section 7106(b)(1) to determine "the numbers, types, and grades of employees or positions * * *." [51] The incompatibility arises, it argued, because an employee cannot be paid for a position unless he has actually been promoted to it. Because two persons cannot hold the same position, the agency could not temporarily pay an employee at a higher rate without either assigning him to an already vacant position or creating a new one; and requiring management to do this, the agency asserted, would violate its reserved right to determine the number and grades of positions. The FLRA agreed with the agency that the law requires promotion as a prerequisite to increased pay. But the Authority found no barrier to temporary promotions of employees to encumbered but temporarily vacant posi-

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[49] *Wright-Patterson, supra* note 5, at 10, *Wright-Patterson* JA at 186.

[50] *Id.* at 25, *Wright-Patterson* JA at 201.

[51] 5 U.S.C. § 7106(b)(1).

tions.[52] It therefore concluded that the proposal could be implemented without the Air Force being required to create new positions.[53] Having rejected the agency's main objections, the Authority held Proposal XIV to be negotiable.

C. *No. 80-1358*, Wright-Patterson

The five proposals underlying No. 80-1358 were presented by the American Federation of Government Employees, AFL-CIO (the union) during the same contract negotiations with the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (the agency) as those involved in No. 80-1351. These, however, were held by the FLRA to be nonnegotiable, and it is the union that brings this appeal.

Union Proposals IV, V, VI, and VII would all require management to make certain employee assignments on the basis of seniority. Proposal IV would compel the agency to rotate "details" to lower grade positions among qualified and available employees in inverse order of seniority.[54] Proposal V, dealing with "loans" of employees to meet temporary or emergency needs outside their usual areas of employment, would similarly dictate selection of the least senior employees with requisite

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[52] *Wright-Patterson, supra* note 5, at 26 & n.54, *Wright-Patterson* JA at 202 & n.54.

[53] *Id.* at 25-27, *Wright-Patterson* JA at 201-203.

[54] Union Proposal IV states:

> *Section 3. Details to Lower Graded Positions*
>
> Details to lower grade positions will be rotated among qualified and available employees in inverse order of seniority.

Id. at 7, *Wright-Patterson* JA at 183.

skills.[55] Proposal VI mandates seniority as a selection criterion for temporary assignments outside the bargaining unit "[w]here conditions are less at the receiving location than is provided for by this contract * * *."[56] And Proposal VII would force the agency, in the absence of a volunteer for permanent reassignment from one duty station to another, to select the person to be assigned on an inverse seniority basis.[57]

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[55] The proposal states:

Union Proposal V

Section 4. Loans

B. Selection of employees for loans will be equitably rotated among qualified and available employees with requisite skills in inverse order of seniority.

Id. at 8, *Wright-Patterson* JA at 184.

[56] The proposal states:

Union Proposal VI

Section 5. Temporary Assignments Outside the Bargaining Unit

B. Where conditions are less at the receiving location than is provided for by this contract, the employee's wishes to decline such assignment will be considered. Selection for such assignments will be equitably rotated in accordance with Section [3] of this Article.

Id. at 8, *Wright-Patterson* JA at 184.

[57] The proposal states:

Union Proposal VII

ARTICLE 37 MISCELLANEOUS

Section *Mobility*

Prior to invoking the employment mobility requirement, the employer will seek volunteers from among employees of the same title, series and grade. If there are no volunteers, and the employer is required to unilaterally transfer employees within the unit, the employee with the least amount of seniority shall be selected first. The

The FLRA upheld the agency's claim of nonnegotiability with regard to each of these proposals. All, it concluded, infringed management rights to make personnel assignments protected under Section 7106(a). The crucial failure of Proposals IV, V, VI, and VII, in the Authority's view, lay in their elimination of agency "discretion" in making assignments.[58] "Discretion," it found, was "an essential part" of the package of rights reserved to management under Section 7106(a).[59] "In thus compelling the selection of a particular individual for * * * assignment," the FLRA held, Union Proposals IV, V, VI, and VII "each directly interfere[d] with" a reserved right of management.[60]

Union Proposal XIII specified procedures for determining certain personnel assignments following a reduction in force.[61] It would normally have required the

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remaining employees shall be transferred in ascending seniority order.

Id. at 11, *Wright-Patterson* JA at 187.

[58] *Id.* at 10, *Wright-Patterson* JA at 186.

[59] *Id.*

[60] *Id.*

[61] Proposal XIII states:

ARTICLE 16 REDUCTION IN FORCE

Section 6.

B. Prior to any placement actions, the employer will establish lists of positions by grade, title, series, career potential and location into which personnel may be entitled to bump or retreat. Lists will contain all vacant positions and will be updated weekly. These lists will be made available to all individuals determined to be affected by the RIF. All affected employees will be offered an opportunity to list the preferred positions desired in each grade, in order of preference. The employer will assign employees, in retention order, to positions of

agency to act on the basis of employee preferences. In rejecting the proposal as nonnegotiable the FLRA reiterated its view that "the right of the agency to assign employees includes discretion as to the selection of the particular employee to be assigned." [62] Because Proposal XIII eliminated such discretion, the Authority held it incompatible with the management rights reserved under Section 7106(a)(2)(A) and therefore outside the scope of the duty to bargain.

III

The disputes at the core of these cases issue primarily from the contested relationship between Sections 7106(a) and 7106(b) of Title VII of the Civil Service Reform Act of 1978. In the case of each of the disputed union proposals, the management parties purport to identify some infringement of a management right protected under Section 7106(a). Again in each case, the union responds that Section 7106(a) states explicitly that its own terms are "subject to subsection (b) * * *." And subsection (b), Section 7106(b), clearly states: "Nothing in this section shall preclude any agency and any labor organization from negotiating * * * *procedures* which management officials of the agency will observe in exercising any authority under this section * * *." [63] Because its proposals are cast in procedural terms, the union finds them compulsory subjects of bargaining under the statute.

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preference for which qualified, in the order of preference, unless there are persuasive mission related reasons for not doing so, in which case the employer will provide the reasons in writing to the union and to the employee.

Id. at 23-24, *Wright-Patterson* JA at 199-200.

[62] *Id.* at 24, *Wright-Patterson* JA at 200.

[63] 5 U.S.C. § 7106(b)(2) (emphasis added).

Analysis of the competing arguments must begin with the language of the statute itself. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980). Although that language possesses troubling ambiguities, it does, we think, make clear the intent of Congress, expressed in a distinction between negotiable procedures and management's nonnegotiable substantive authority. There are substantive rights reserved to management under Section 7106(a), subject to—but only to—*procedures* to be negotiated under Section 7106(b).

The difficulty arises, of course, because the distinction between procedure and substance is not always crisp.[64]

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[64] The problematic character of this distinction is by no means unfamiliar to the federal courts, following judicial efforts to apply the dichotomy that was apparently mandated by the Supreme Court's landmark holding in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Reversing the longstanding decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *Erie* held: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. * * * There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' * * *." 304 U.S. at 78. Yet, as Justice Reed noted in dissent, "no one doubt[ed] federal power over procedure." *Id.* at 92. The dichotomy between substance and procedure thus seemed not only complete but binding on the federal courts. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 272 (3d ed. 1976).

As the courts quickly discovered, however, there are at least two difficulties in applying the distinction. The first is simply that "procedures" are not easily cabined, the realm of "substance" not easily protected from encroachment; for "almost every procedural rule may have a substantial effect on the outcome of a case." C. WRIGHT, *supra*, at 256. This difficulty apparently caused the collapse of the Supreme Court's effort, begun in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), to define as "substantive" any legal rule that might determine the outcome in a particular case. The outcome-determinative

Union proposals establishing "procedures" for employee selection illustrate the uncertain boundary between the categories. Selection on the basis of seniority, for example, defines a procedure for the exercise of management's right to hire or promote. But it is equally true that a proposal requiring selection based on seniority both establishes the substantive criterion pursuant to which selection will occur and identifies the particular

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test simply had "no readily apparent stopping place * * *." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 (1954). Yet, on the other side, lines of demarcation had to be drawn if there were to remain any nontrivial federal power to establish judicial "procedures." The second problem, as Justice Frankfurter pointed out in *Guaranty Trust, supra*, is that the impossibility of drawing a clear bright line between substance and procedure leads to a predictable confusion: "'[S]ubstance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." 326 U.S. at 108; *see Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

More recent Supreme Court cases have substantially redefined the so-called "*Erie* doctrine," and it is now clear that no simple litmus test will determine which "procedural" issues are governed by state and which by federal law. C. WRIGHT, *supra*, at 272; *see, e.g., Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) (federal policies concerning governance of courts properly weighed in determining whether to apply state or federal rules); *Hanna v. Plumer, supra*, 380 U.S. at 469-470 (correcting "the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure"). Nonetheless, courts and lawyers continue to talk in terms of a distinction between substance and procedure, and they continue to make important decisions turn upon it. For an exploration of some of the many aspects of the interrelationship between substance and procedure, *see generally* R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE (1979).

employee to be chosen. Unless procedure is to be permitted to swallow substance entirely, it therefore becomes necessary to inquire into the range of proposals to be deemed "procedural" within the contemplation of the statute.

The need for an interpretive standard of this kind accounts for the various formulae enunciated by the FLRA and for those urged by the parties on this court. In *Dix-McGuire*, No. 80-1119, the Authority held that proposals structured in procedural language would be negotiable unless the effect of their adoption would be to stop management from "acting at all." [65] In so doing it rejected the argument of the agency, which proposed to draw a different line between procedure and substance. The agency suggested that a proposal ceased to be procedural within the intent of the law if it was of such a character as to "unreasonably delay" management action.[66] In the *Wright-Patterson* cases the FLRA again undertook to draw a line between proposals that are properly procedural within the meaning of the statute and those that impinge on substantive agency authority. The Authority held in these cases that various proposals advanced by the union were not negotiable, despite their being expressed in procedural terms, because their adoption would "directly interfere" [67] with reserved management rights to make decisions of substance. The union now contests this standard, insisting on the propriety of the "acting at all" test propounded by the Authority in *Dix-McGuire*. It also argues that the Authority erred in applying different standards in the two cases.[68]

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[65] *Dix-McGuire, supra* note 5, at 3, *Dix-McGuire* JA at 31.

[66] *See id.* at 2-3, *Dix-McGuire* JA at 30-31.

[67] *Wright-Patterson, supra* note 5, at 10, *Wright-Patterson* JA at 186.

[68] *See* brief for petitioner AFGE, No. 80-1358, at 11.

Despite the inherent ambiguities of the distinction between procedure and substance, and the attendant difficulties in its application, the intent of Congress cannot be ignored. It is the task of the FLRA, authorized by statute to "provide leadership" in implementing the labor-management chapter of the Civil Service Reform Act,[69] to develop workable standards consistent with the Act's underlying policies and intent.

In this regard, we think it appropriate to note what we perceive as a difference in kind among the cases calling for application of the statutory distinction between negotiable procedures and reserved substantive rights. There are, on the one hand, cases in which proposals cast in procedural language impinge on substantive management decisions by specifying the criteria pursuant to which decisions must be made. There are, on the other, more nearly "pure" procedures, which have less direct substantive repercussions—for example, procedures for use in determining which employees possess characteristics identified by management as appropriate criteria for choice. In view of this difference, we proceed to our discussion and decision of these consolidated cases without assuming beforehand that a standard found appropriate for one of these classes must also be applied to the other.

IV

A. *No. 80-1119*, Dix-McGuire

The sole negotiability issue in *Dix-McGuire* involves a proposed union contract term under which no employee could be removed or suspended from his job until com-

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[69] Section 7105(a)(1) of the Act, 5 U.S.C. § 7105(a)(1), provides:

> The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

pletion of the review procedures provided under a collective bargaining agreement. Management objected that the proposal invited procedural delays incompatible with its reserved authority under Section 7106(a). Overruling this objection, the FLRA upheld the negotiability of the proposal.

As the FLRA recognized, the plain language of the statute strongly supports the union's position. Although Section 7106(a) asserts that nothing in the Reform Act "shall affect the authority of any management official" to hire, and take disciplinary action, it *also* provides that the terms of subsection (a) are "[*s*]*ubject to subsection (b)* * * *."[70] And subsection (b) clearly states that "[n]othing in this *section*"—which *includes* subsection (a), on which management's argument is based—"shall preclude any agency and any labor organization from negotiating * * * procedures which management officials of the agency will observe in exercising any authority under this section * * *."[71] The language of Section 7106 thus seems to establish a hierarchy, in which the terms of subsection (b) hold priority over those of subsection (a). And the union proposal in this case, involving procedures to be followed prior to the exercise of management's right to discharge and discipline employees, appears to fall plainly within the language of Section 7106(b).

Before affirming this conclusion, however, we—like the FLRA—must take account of the management claim that the proposal in this case was not properly "procedural" within the meaning of the statute, because the effect of its adoption would be to "eviscerate" management rights enumerated in Section 7106(a). The FLRA

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[70] 5 U.S.C. § 7106(a) (emphasis added). Section 7106(a) is quoted in its entirety in text at note 25 *supra*.

[71] 5 U.S.C. § 7106(b)(2) (emphasis added).

weighed this argument, but concluded that this threatened effect would not occur. "[T]he procedural requirement established by the proposal," the Authority held, "relates only to *when* the suspension or removal may be effectuated, not to whether the agency ultimately will be able to implement those actions." [72] The mere possibility of delay would not take a proposal outside the statutory obligation to negotiate. The test of negotiability, the FLRA held, was whether a union proposal would, if adopted, prevent agency management from "acting at all." [73]

In its brief in this court the agency rests its claim for reversal of the FLRA's decision largely on an attack on this asserted rule of decision: the holding that procedural proposals are negotiable under the statute unless their adoption would stop the agency from "acting at all." In the context of this case—one involving a procedural proposal that does not directly mandate substantive criteria pursuant to which management must act—we find the attack to be unconvincing.

We note at the outset that the "acting at all" standard is a reasonable and natural construction of the statutory language, rendered by the agency given responsibility for administering the statute [74]: The manage-

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[72] *Dix-McGuire, supra* note 5, at 4, *Dix-McGuire* JA at 32 (emphasis in original).

[73] *Id.* at 3, *Dix-McGuire* JA at 31.

[74] We are not unmindful that deference by a court to an agency's determination is particularly appropriate "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Development Co. v. Int'l Union of Elec., Radio & Machine Wkrs*, 367 U.S. 396, 408 (1961), *quoting Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *see also Nat'l Federation*

ment power to act that is protected by Section 7106(a) may be limited by procedures under Section 7106(b), but only so far as the procedures do not have the effect of eliminating management authority by preventing its "acting at all."

Moreover, the "acting at all" standard finds support in—even if it is not necessarily mandated by—the legislative history. In this regard it stands in marked contrast with the alternative standard advanced by the management parties, who contend that a proposal should be held nonnegotiable if its adoption might occasion "unreasonable delay" in the exercise of management rights.

In its opinion below the FLRA justified its adoption of the "acting at all" standard largely by citation to a single passage in the report of the House-Senate conference committee that reported Title VII of the Civil Service Reform Act in the form in which it became law.[75] In their briefs in this court the parties again treat this passage as central. It bears quotation in full:

> 3. [Proposed] Senate section 7218(b) provides that negotiations on procedures governing the exercise of authority reserved to management shall not *unreasonably delay* the exercise by management of its authority to act on such matters. Any negotiations on procedures governing matters otherwise reserved to agency discretion by subsection (a) may not have the effect of actually negating the authority as reserved to the agency by subsection (a). There are no comparable House provisions.
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> *The conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be con-*

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of Federal Employees v. FLRA, —— F.2d ——, —— (D.C. Cir. No. 80-1708, decided May 29, 1981) (slip op. at 3-4); *Haviland v. Butz*, 543 F.2d 169, 174 (D.C. Cir. 1976).

[75] *See Dix-McGuire*, *supra* note 5, at 2-3, *Dix-McGuire* JA at 30-31.

> *ducted in a way that prevents the agency from acting at all*, or in a way that prevents the exclusive representative from negotiating fully on procedures. * * *[76]

In our view, analysis restricted to this text alone reveals an inescapable ambiguity. The agency contends that the conference intended the "acting at all" standard to be applied to bar *negotiations* so protracted as to prevent management action; the substantive negotiability of union proposals, it says, should be judged against a standard of whether their *adoption* might cause the exercise of management rights to be unreasonably delayed.

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[76] Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978), *quoted in Dix-McGuire, supra* note 5, at 3 n.5, *Dix-McGuire* JA at 31 n.5. Section 7218 of the Senate bill, to which the quoted passage refers, provided in pertinent part:

> (b) Nothing in subsection (a) of this section shall preclude the parties from negotiating—
>
> (1) procedures which management will observe in exercising its authority to decide or act in matters reserved under such subsection; or
>
> (2) appropriate arrangements for employees adversely affected by the impact of management's exercising its authority to decide or act in matters reserved under such subsection,
>
> except that such negotiations shall not unreasonably delay the exercise by management of its authority to decide or act, and such procedures and arrangements shall be consistent with the provisions of any law or regulation described in 7215(c) of this title, and shall not have the effect of negating the authority reserved under subsection (a).

Report of the Committee on Governmental Affairs of the United States Senate to Accompany S. 2640, S. Rep. No. 95-969, 95th Cong., 2d Sess. 140, 212 (1978). S. 2640 was passed by the Senate, without relevant amendment, on August 24, 1978. 124 Cong. Rec. S14324 (daily ed. Aug. 24, 1978).

The FLRA, on the other hand, argues that the conference intended the "acting at all" test to apply to proposed contract provisions as well, as the ultimate measure of their negotiability under the statute.

Although the quoted passage is ambiguous at best, we believe that the legislative history, taken as a whole, gives stronger support to the view of the FLRA than to that of the agency. We reach this conclusion after review of the legislative approaches to the body of case law that had grown up under the FLRA's predecessor agency, the Federal Labor Relations Council. Prior to the passage of the Civil Service Reform Act, collective bargaining between employees and the federal agencies was governed by Executive Order. Like Section 7106(a) of the Reform Act, Section 12(b) of Executive Order 11491 established certain management rights not subject to bargaining.[77] Regarding Section 12(b), the Council's interpretive principle was clear. In a series of cases beginning with *Local 63, American Federation of Government Employees, AFL-CIO, and Blaine Air Force*

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[77] Unlike § 7106(a), however, § 12(b) did not purport to make reserved management rights "subject to" negotiable procedures. The pertinent language of § 12(b) provided:

> SEC. 12. *Basic provisions of agreements.* Each agreement between an agency and a labor organization is subject to the following requirements—
>
> * * * *
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations—
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> * * * *
>
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees[.]

3 C.F.R. 869-870 (1966-1970 Compilation), *reprinted in* 5 U.S.C. app. at 258, 261 (Supp. III 1979).

Station, Blaine, Washington (*Blaine*), 3 FLRC 75 (1975), the Council held union bargaining proposals to be nonnegotiable if they contained procedures that would "unreasonably delay" the exercise of reserved management rights.[78]

As Congress began its deliberations over proposals to enact civil service reform legislation, the status of the existing case law became a focus of concern. The Carter Administration drafted proposed statutory language that would have placed the "provisions, policies and approaches of Executive Order 11491" into law,[79] and the Senate Committee on Governmental Affairs and then the Senate as a whole retained the Administration language in Section 7218 of the Senate bill. This language—the very

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[78] *See Nat'l Treasury Employees Union and Bureau of Alcohol, Tobacco & Firearms, Dep't of the Treasury*, 6 FLRC 176 (1978); *Nat'l Treasury Employees Union, Chapter 101, and U.S. Customs Service, Office of Regulation & Rulings*, 6 FLRC 986 (1978); *American Federation of Gov't Employees, Local 3632, and Corpus Christi Army Depot*, 6 FLRC 1071 (1978).

These cases represented an extension of the principles underlying *Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois*, 1 FLRC 227, 230 (1972), in which the Council held that § 12(b) permitted "negotiations of procedures * * * which management will observe in [exercising § 12(b) rights], provided that such procedures do not have the effect of negating the authority reserved." In the cases in the *Blaine* line the Council found bargaining proposals nonnegotiable on the theory that they contained procedures that would so unreasonably delay the exercise of management's right to act under § 12(b) as to negate that right.

[79] Letter from Alan K. Campbell, Chairman, Civil Service Commission, and James T. McIntyre, Jr., Director, Office of Management and Budget, to Senator Ribicoff, transmitting Administration Amendment No. 2084 to S. 2640, 124 Cong. Rec. S7469 (daily ed. May 15, 1978).

language that the conference committee decided to delete—was explained as follows by the Committee on Governmental Affairs:

> [I]t is specified in subsection [7218(b)] that nothing in that subsection shall preclude parties from negotiating procedures which management will observe in exercising its authority to decide or act or from negotiating arrangements for employees adversely affected provided that such negotiations do not result in certain consequences and are consonant with law and regulations * * *. These principles with respect to the obligation to negotiate "procedures" and "impact," while not expressly stated in Executive Order 11491, are established in case law thereunder.[80]

As illustrated by the reference to the "case law," the Senate bill clearly intended to adopt the *Blaine* principle that negotiation would not be permitted—that a proposal would be deemed nonnegotiable—if it might produce "certain [unacceptable] consequences," such as adoption of procedures resulting in unreasonable delay.

The House of Representatives dealt very differently with the Administration proposal to import the "unreasonable delay" standard into the new law. In the House "management rights" provisions that reflected the Administration position were called to votes on at least two occasions, once in the Committee on Post Office and Civil Service[81]

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[80] S. Rep. No. 95-969, 95th Cong., 2d Sess. 109 (1978).

[81] Before beginning markup on H.R. 11280, the Democratic members of the Post Office and Civil Service Committee met in caucus. *See* 124 Cong. Rec. H5248 (daily ed. June 9, 1978). Following that meeting the committee used language drafted by Chairman Clay and Representatives Ford and Solarz as the working text from which it refined most of the labor-management provisions of the committee bill. *See* H.R. Rep. No. 95-1403 on H.R. 11280, 95th Cong., 2d Sess. 400

and once on the House floor.[82] They were rejected in both instances. The relevant language that ultimately was adopted by the House—the exact language now contained in Section 7106 of the Civil Service Reform Act—was offered in a floor amendment by Representative Udall.[83] In an accompanying Sectional Analysis he explained the Section 7106 relationship between reserved rights and negotiable procedures in these terms:

> This substitute strengthens the "Management rights" section reported by the Committee, but it is *still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment.*
>
> * * * [M]anagement has reserved the right to make the final decision to "remove" an employee, but that decision must be made *in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement.* The reserved management right to "remove" would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement.[84]

(1978) (supplemental views); 124 Cong. Rec. H8467 (daily ed. Aug. 11, 1978). Following this implicit rejection of the Administration language and purposes, an Administration draft was explicitly offered as an amendment to the Clay-Ford-Solarz text. It was rejected by the committee on a vote of 9-16. 124 Cong. Rec. E4497 (daily ed. Aug. 10, 1978).

[82] On September 13, 1978 Representative John Collins introduced an amendment that was identical to the Senate bill in both its enumeration of management rights and its restrictions on negotiable procedures. *See* 124 Cong. Rec. H9621-H9622, H9624 (daily ed. Sept. 13, 1978). The Collins amendment was defeated by voice vote. *Id.* at H9653.

[83] *See* 124 Cong. Rec. H9627 (daily ed. Sept. 13, 1978) (§ 7106).

[84] 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978) (emphasis added).

Two facts about this statement deserve comment. First, Representative Udall obviously contemplated negotiation over disciplinary procedures, such as those at issue in No. 80-1119. Second, the Udall amendment made no reference to "unreasonable delay." Indeed, Representative Udall actively opposed unsuccessful amendments that would have retained this legal standard.[85]

The House-Senate conference committee adopted the House version of Section 7106—the version introduced by Representative Udall—without revisions.[86] It is on the report of that committee, quoted above, that the parties principally rely for evidence of congressional intent.

As noted, the management parties argue that the FLRA has misread the conference report. They contend that the deleted Senate provision and the explanatory language of the committee addressed "the issue of the time consumed in negotiations, not the time necessary to complete the negotiated procedures once the procedures are agreed upon." [87] In the context of the full legislative history, however, this view of the committee report is hard to accept. The antecedent legislative debate had clearly focused, not on the threat of protracted negotiations, but on the *kinds* of proposals that ought and ought not to be negotiable. Despite being invited to do so, the House had explicitly declined to accept language adopt-

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[85] *See* 124 Cong. Rec. H9458 (daily ed. Sept. 11, 1978) (remarks of Rep. Udall) (opposing Erlenborn amendment); 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall) (offering Udall amendment as substitute for Collins amendment).

[86] *See* Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978).

[87] Brief for petitioners Department of Defense *et al.*, No. 80-1119, at 24.

ing an "unreasonable delay" standard for determining the negotiability of union proposals. And the Senate, which had earlier opted for that standard, agreed to deletion of the pertinent language by the House-Senate conference. It was that Senate agreement that the disputed language of the conference report sought to explain. Under the circumstances, we cannot say that the FLRA misconstrued the conference report in deriving its "acting at all" test of negotiable procedures under Section 7106.

The agency advances other arguments why this court should reject the "acting at all" standard enunciated by the FLRA. For example, the agency argues that it is implausible to think that Congress would pass a law countenancing, not merely delay, but "unreasonable delay," in implementation of management decisions.[88] In the context, however, its argument is unconvincing. As the FLRA has emphasized, a negotiability standard is used only to determine whether a proposal is a proper subject of bargaining, not whether it ought to be implemented on the merits.[89] In collective bargaining, government managers are presumably competent to look out for government interests. Congress has clearly acted on this premise in the enactment of other legislation, such as the labor-management chapter of the Foreign Service Act of 1980.[90] Indeed, in reporting Section 1005 of the Foreign Service Act,[91] a management rights provision

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[88] *See id.* at 17-19.

[89] The FLRA's *Dix-McGuire* opinion said explicitly, "In * * * deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal." *Dix-McGuire, supra* note 5, at 2 n.3, *Dix-McGuire* JA at 30 n.3.

[90] Pub. L. No. 96-465, 94 STAT. 2071 (1980).

[91] 22 U.S.C.A. § 4105 (1981 Pocket Part).

that was modeled after Section 7106 of the Civil Service Reform Act,[92] the House-Senate conference not only urged adoption of an "acting at all" standard; it cited Section 7106 of the Civil Service Reform Act as precedent for its decision to do so:

> [W]ith respect to negotiated procedures the [House and Senate] bills are consistent and reflect the conference report to accompany the Civil Service Reform Act of 1978 (S. Rept. 95-1271, p. 158), which stated that *the standard for determining whether a proposal is nonnegotiable is whether it "prevent[s] the agency from acting at all.* * * * [93]

The conference report was "agreed to" by both the full Senate and the full House.[94]

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[92] *See* H.R. Rep. No. 96-1432, 96th Cong., 2d Sess. 117 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 8018, 8026 ("The chapter 10 provisions resulted from an amendment adopted in subcommittee in the House which was modeled after title VII of the Civil Service Reform Act of 1978.").

[93] *Id.* (emphasis added; last brackets in original).

[94] *See* 126 Cong. Rec. S13871 (daily ed. Sept. 30, 1980) (Senate agreement); 126 Cong. Rec. H10238 (daily ed. Oct. 1, 1980) (House agreement). Although we have also considered this legislative history as relevant evidence of the intent of the Congress that passed § 7106 of the Civil Service Reform Act, *see, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Glidden v. Zdanok*, 370 U.S. 530, 541-542 (1963) (opinion of Harlan, J., in which Brennan and Stewart, J.J., joined), we recognize that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), *quoting United States v. Price*, 361 U.S. 304, 313 (1960), *quoted in United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963). Thus, while we have weighed this information in upholding the FLRA's "acting at all" standard, we have certainly not regarded it as dispositive of the question of congressional intent, or indeed treated it as an especially important factor in our deliberations.

The agency also offers arguments that the FLRA's "acting at all" standard must be rejected as inconsistent with other provisions of the Reform Act. These claims do not require prolonged discussion.

The agency contends that toleration of lengthy delays prior to management removal of employees would be inconsistent with the statutory authority of management to "take whatever actions may be necessary to carry out the agency mission during emergencies." [95] This argument is misdirected. The proposal under review deals only with *disciplinary* suspensions and removals. It does not necessarily apply to emergency assignments, even for disciplinary reasons.

The agency similarly argues that toleration of delays is inconsistent with the statutory command that any "negotiated grievance procedure * * * shall provide for expeditious processing * * *." [96] This provision may, indeed, place some limit on the kind of grievance procedures to which the parties could agree.[97] But management has not shown that arbitration is so slow as to run afoul of this standard, and the FLRA was not required to conclude otherwise. The characteristic speed of arbitral dispute resolution [98] also refutes the argument

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[95] 5 U.S.C. § 7106(a) (2) (D).

[96] 5 U.S.C. § 7121(b) (2).

[97] In this connection, we note that the FLRA has broad rulemaking and interpretive powers, which it might profitably use to define the time limits that must be satisfied for dispute resolution proposals to be negotiable under Title VII of the Civil Service Reform Act.

[98] The very nature of arbitration tends to promote expeditious resolutions of disputes. *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 240 (1970). It is for this reason that arbitration is so widely favored in both public and private sector labor relations. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 7, 10-12 (1970 ed.).

that the union's proposal in this case tolerates indefinite delay and thus should be declared nonnegotiable as impairing management's reserved authority even under the FLRA's "acting at all" standard.

Finally, the agency lodges an objection that the FLRA failed to consider relevant factors before reaching its challenged decision. This claim rests principally upon 5 U.S.C. § 7135(b), which states in pertinent part that "decisions issued under Executive Order[] 11491 * * * shall remain in full force and effect * * * unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter." As construed by the agency, Section 7135(b) establishes that the decisions of the Federal Labor Relations Council —including those holding union proposals nonnegotiable under an "unreasonable delay" standard [99]—were due substantial deference from the FLRA. At a minimum, the agency says, the FLRA was required to explain its departure from Council precedents.

Our review of the legislative history should make obvious the weakness of this argument. The language of Section 7106 differs in important and relevant aspects from that of the parallel Section 12(b) of Executive Order 11491.[100] Moreover, in opting for the new lan-

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[99] *See, e.g., Local 63, American Federation of Gov't Employees, AFL-CIO, and Blaine Air Force Station, Blaine, Washington*, 3 FLRC 75 (1975); *Nat'l Treasury Employees Union and Bureau of Alcohol, Tobacco & Firearms, Dep't of the Treasury*, 6 FLRC 178 (1978); *Nat'l Treasury Employees Union, Chapter 101, and U.S. Customs Service, Office of Regulations and Rulings*, 6 FLRC 986 (1978); *American Federation of Gov't Employees, Local 3632, and Corpus Christi Army Depot*, 6 FLRC 1071 (1978).

[100] Most obviously and importantly, § 12(b) did not include language expressly making the exercise of management rights "subject to" negotiable procedures. *See* note 77 *supra* (*quoting* pertinent language from § 12(b)).

guage the House and then the Senate-House conference explicitly rejected alternative proposals that would have retained the interpretive standards of the existing case law.[101] Under the circumstances, it is apparent that the Council decisions to which the agency appeals were "superseded by specific provisions of this chapter" within the meaning of Section 7135(b).

B. *Nos. 80-1351 and 80-1358*, Wright-Patterson

Five of the seven union proposals at issue in Nos. 80-1351 and 80-1358 involve procedures that would have conditioned certain job assignments at least partly on an employee's seniority. These proposals obviously implicate substantive concerns. They identify a substantive criterion—namely, length of employment—on the basis of which personnel assignments would be made.

In weighing the negotiability of these proposals under Section 7106 the FLRA applied what the parties have characterized in this court as a "direct interference" test. Under this standard, as explicated by the Authority, a proposal for employee selection procedures would be held nonnegotiable if its implementation would "directly interfere with the agency's basic right to assign employees [as reserved] under section 7106(a)(2)(A) * * *." [102] This is of course a different test of negotiability from the "acting at all" standard articulated by the Authority in *Dix-McGuire*, and the union has suggested here that this alleged inconsistency must be corrected.[103]

We find no necessary incompatibility between the two approaches. Proposals to establish seniority as a basis for

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[101] *See* notes 76-94 *supra* and accompanying text.

[102] *Wright-Patterson*, *supra* note 5, at 20, *Wright-Patterson* JA at 186.

[103] *See* brief for petitioner AFGE, No. 80-1358, at 20-25, 55-56.

personnel assignments stand close to the uncertain border between procedure and substance.[104] Such proposals are therefore different in kind from that involved in *Dix-McGuire*—a proposal that did not specify the criteria on which disciplinary action should be based, but only designated procedures for determining whether management criteria had in fact been satisfied in a particular instance. In view of the difference between the kinds of proposals under review, we cannot agree that an identical standard must be applied to both. Rejecting the challenge based on this point, we find no need to address the FLRA's contention in this court that application of the "acting at all" standard would have yielded the same results as those obtained under the "direct interference" formula.[105]

In developing and applying the "direct interference" test, the FLRA appears to have reasoned from the premise that "[t]he right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide [whether] to assign an employee" [106] after that employee has been identified by negotiable standards as uniquely eligible for the assignment. Management, in other words, must retain more than a right to say yes or no to an employee who is identified for assignment under selection standards negotiated with a union.

The union vigorously disputes this premise. It argues that "the authority to assign in [Section] (a)(2)(A) means just what the plain language states, and nothing more: the authority to assign—the legal entitlement to

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[104] *See* note 64 *supra* and accompanying text.

[105] *See* brief for respondents Department of Defense *et al.*, Nos. 80-1351 and 80-1358, at 44.

[106] *Wright-Patterson*, *supra* note 5, at 10, *Wright-Patterson* JA at 186.

take an official personnel action." [107] Because decisions about selection criteria do not effect any legal change in an employee's status, the union argues, they do not constitute "personnel action" within management's reserved authority.[108]

The union's constrictively literalist construction of Section 7106(a) would permit collective bargaining over literally all personnel qualifications, no matter how essential to successful job performance, and would allow contractual requirements of selection based on a scaled ranking. We find this interpretation to be unsupportable. It ignores repeated assertions in the legislative history that Congress aimed to create a "balanced" statute [109] that

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[107] Brief for petitioner AFGE, No. 80-1358, at 19.

[108] *Id.*

[109] *See, e.g.*, 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall) ("[Section 7106] gives some balance. We are saying to the Federal employees that we are going to give management some broad new rights * * *. And employee organizations are saying, in turn, that they are entitled to have a more independent, secure position from which to deal with management * * *."); 124 Cong. Rec. H9647 (daily ed. Sept. 13, 1978) (remarks of Rep. Ford) ("[W]hile considering the increased powers for management, we always had in mind that we would put together a totality here * * * that we hoped would represent a fair package of balanced authority for management, balanced with a fair protection for at least the existing rights the employees have."); 124 Cong. Rec. S17083 (daily ed. Oct. 4, 1978) (statement of Sen. Sasser) (the conference report "establishes a responsible and balanced system of labor-management relations for Federal employees" and helps to create "a civil service system that truly serves the American public while offering necessary protections to [civil servants]"); *id.* (remarks of Sen. Percy) (the federal labor-management relations chapter "represents a fair balance between the rights of employees to form and participate in bargaining units * * * and the need of the Government to maintain the efficiency of its operations.").

would, in the words of Representative Udall, the leading framer of Title VII, "give management the power to manage and the flexibility that it needs." [110] Indeed, the union view would so thoroughly subordinate Section 7106(a) to Section 7106(b) as to read the former effectively out of the statute. Familiar canons of interpretation thus counsel rejection of the union's position. We must attempt to read the statute in a "manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 65 (5th Cir. 1970); *see Equal Employment Opportunity Comm'n v. Louisville & Nashville R. Co.*, 505 F.2d 610, 616-617 (5th Cir. 1974). Further, where alternative interpretations are possible, we should attempt to give effect to every word that Congress used. *See Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

The Authority's construction of the statutory language, and its application of that construction to the proposals before it, accord far better with the teaching of these canons. Lacking clear guidance in the statutory language, the FLRA reasoned, consistent with the statute's purpose and its legislative history, that the right to establish personnel standards and qualifications was implicit in the reserved management right to make assignments: "An agency chooses to assign an employee to a position so that the work of that position will be done. Under section 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position * * *." [111] And these requirements, the FLRA continued, must be determined not on a general but on an individual basis. The agency, it held, must be able to decide whether a particular employee being considered for assignment has such "job-

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[110] 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978).

[111] *Wright-Patterson, supra* note 5, at 10, *Wright-Patterson* JA at 186.

related individual characteristics as judgment and reliability." [112] "Therefore," the Authority concluded, "the right to assign an employee to a position includes the discretion to determine which employee will be assigned." [113]

The FLRA's decisions on the seniority proposals before it followed logically from its determination that Section 7106(a) protected the agency's right to exercise discretion at the conclusion of procedures to test and quantify employee qualifications. Union Proposals IV, V, VI, and VII would each have compelled selection of a particular individual, based on seniority, at least in some instances. Once the agency had "determined the particular qualifications and skills needed to perform the work of the position to which the employee will be assigned, and identified the employees in the unit who meet those requirements and would be available for assignment, selection from among the employees so identified of the particular employee who will be assigned must be on the basis of seniority." [114] The Authority held the proposals nonnegotiable on this basis. "In * * * compelling the selection of a particular individual for temporary assignment to another position"—and thus removing the agency's discretion to make individual judgments based on the judgment and reliability of particular persons—the proposals "directly interfere[d] with the right of the agency to assign employees." [115]

Union Proposal III was subjected to an identical analysis. It, however, was held negotiable because it reserved to the agency the option of using "competitive

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[112] *Id.*

[113] *Id.*

[114] *Id.* at 9, *Wright-Patterson* JA at 185 (footnote omitted)

[115] *Id.* at 9-10, *Wright-Patterson* JA at 185-186.

procedures" to make its selections. As defined in the *Federal Personnel Manual*, "competitive procedures" retain the agency's right to "select or not select from among a group of best qualified candidates." [116] To the Authority, this reserved discretion made a crucial difference:

> [U]nder Union Proposal III, the agency retains the option of exercising its discretion to select a particular employee for assignment. Only if the agency chooses not to use competitive procedures must it select the individual on the basis of seniority. Because Union Proposal III preserves in this manner the agency's discretion to select, the proposal does not directly interfere with the agency's basic right to assign employees under section 7106(a)(2)(A) of the Statute.[117]

Under the circumstances presented by this case, we believe that the FLRA's decisions concerning Proposals III, IV, V, VI, and VII must be upheld. We begin with the recognition that courts must yield great deference to an interpretation of a statute by the agency entrusted with its administration. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 4 (1965). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Development Co. v. Int'l Union of Elec., Radio & Machine Wkrs*, 367 U.S. 396, 408 (1961), *quoting Norwegian Nitrogen Products Co. v. United States*, 288

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[116] *Federal Personnel Manual*, ch. 335, subch. 1-4, Requirement 4, *quoted in Wright-Patterson, supra* note 5, at 10 n.19, *Wright-Patterson* JA at 186 n.19.

[117] *Wright-Patterson, supra* note 5, at 10, *Wright-Patterson* JA at 186.

U.S. 294, 315 (1933), in turn *quoted in Nat'l Federation of Federal Employees v. FLRA*, *supra*, —— F.2d at ——, slip opinion at 3-4, *and in Udall v. Tallman*, *supra*, 380 U.S. at 16. The surface ambiguity of the central statutory distinction provides a further reason for us to defer to the considered judgment of the Authority. As we explained above, the task of distinguishing negotiable procedures from management's reserved substantive authority involves questions of judgment and balance, about which reasonable people could easily differ. And Congress intended the needed judgments to be made, not by this court, but by the Authority. "To sustain the Commission's application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946), *quoted in Udall v. Tallman*, *supra*, 380 U.S. at 16. As the Supreme Court has stated repeatedly, "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (footnote omitted); *see Board of Gov. of Federal Reserve System v. First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

We find no compelling indications of error in the cases before us. On the contrary, the Authority's interpretation of the statute—as reserving a limited management discretion in employee selection—is entirely consistent with the admonition that "[t]he provisions of [Title VII of the Civil Service Reform Act] should be interpreted in a manner consistent with the requirement of an effective and efficient Government."[118] Moreover, it ac-

[118] 5 U.S.C. § 7101(b).

cords in both its aspects—its upholding of Proposal III and its rejection of Proposals IV, V, VI, and VII—with the sectional analysis of Section 7106 proffered by Representative Udall, the draftsman of the language enacted into law. Subsection (a)(2)(C) of Section 7106 reserves the management right to

> make selections for appointments from—
>
> (i) *among* properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source[.] [119]

As construed by Representative Udall, "The intent of this provision is to *preserve as bargainable* * * * the *standards, criteria, and procedures* for establishing promotion certificates, *while ensuring management's right to make the actual selection* from the certificate, or to make the appointment from any other appropriate source." [120] Proposal III, which reserves a management right to choose *among* candidates ranked according to competitive procedures, obviously qualifies as bargainable under the Udall analysis.[121] But Proposals IV, V, VI,

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[119] 5 U.S.C. § 7106(a)(2)(C)(i) & (ii) (emphasis added).

[120] 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978) (emphasis added).

[121] The agency rightly notes that competitive procedures need not be used in all instances under Proposal III. And, if they are not employed, management would be compelled in particular cases to choose either the most senior "qualified employee" or none at all. Because agency "discretion" would thus be severely limited, if not "eviscerated," in these instances, the agency argues, the FLRA's ruling on this proposal must be reversed. We do not agree. By permitting the agency to use competitive procedures, Proposal III preserves the management right—in cases where management thinks it essential to do so—to identify and select employees on the basis of their personal job-related characteristics. The statutory goals of competence and efficiency are thus respected. Moreover, by allowing management to determine when the

and VII, which prescribe mandatory selections based on seniority, fail to pass its strictures.

We are untroubled by the agency's argument that the FLRA was barred from reaching its decisions without according deference to the body of decisional law that had developed under the Federal Labor Relations Council. As we noted in our discussion of a similar claim raised in *Dix-McGuire, supra*, Congress plainly viewed Section 7106, if not Title VII as a whole, as a departure from the law that had developed under a comparable section of Executive Order 11491.[122] Moreover, there is legislative history to indicate that Congress intended Section 7135(b), not to bind the FLRA or necessarily even to influence its decisions, but only to provide con-

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demands of a particular job assignment require selection on the basis of refined judgments of individual capabilities and when they do not, the proposal reserves management discretion of an important kind. Further, as we have noted, the statutory language necessitates judgmental linedrawing. Thus, although we do not regard the agency argument to be without force, we have no doubt that the ruling of the FLRA should be upheld against it. It is the FLRA, not this court, that has been entrusted by Congress with broad powers to administer Title VII and to establish policies and provide guidance thereunder. 5 U.S.C. § 7105; *see Nat'l Federation of Federal Employees v. FLRA, supra* note 74, —— F.2d at ——, slip op. at 3-4; *Clark v. Mark*, N.D. N.Y. No. 79-CV-777 (Aug. 28, 1980); *Nat'l Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute*, 493 F.Supp. 675 (N.D. Cal. 1980). If the FLRA's construction of the statute is reasonably defensible, we are not free to reject it merely because we might decide differently if confronted with the question in the first instance. *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Finding the FLRA's decision to be entirely defensible against this agency challenge, we need go no further in an unnecessary attempt to reach an independent conclusion on the merits of the contending arguments.

[122] *See* notes 98-101 *supra* and accompanying text.

tinuity while the Authority developed its own body of interpretive law under the new statute.[123]

Proposal XIII

The FLRA held Union Proposal XIII to be nonnegotiable for essentially the same reasons that it had

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[123] Two members of the House committee that reported the provision that became 5 U.S.C. § 7135(b), § 7136(b) of H.R. 11280, explained its intent in this fashion in remarks to their colleagues on the House floor. Representative Ford stated:

> There was great concern that the new [A]uthority would simply "rubber-stamp" the decisions and procedures of the Federal Labor Relations Council that it replaces. The "superseded" language is intentionally included to make clear that the new [A]uthority, acting under its own statutory charter, is not to repeat past mistakes in the area of labor-management relations. * * *
>
> This subsection is included as drafted because of the concern that the development by the new [A]uthority of the contours of the new labor-management program will necessarily take time. During that time, questions about the legal efficacy of existing regulations and decisions could prove quite disruptive. Consequently, this subsection provides that such regulations and decisions will continue in force until superseded by regulations and decisions issued under [the statute].

124 Cong. Rec. H9651 (daily ed. Sept. 13, 1978).

Representative Clay offered a similar interpretation:

> [This section includes] express recognition of our expectation that the new Federal Labor Relations Authority will issue decisions superseding those of the Council. (In the interest of continuity we also provide that Council decisions will continue in force until superseded.) We fully expect that the Authority will not repeat the mistakes of the Council, especially since the authority is acting under a new statutory charter mandating a new approach to Federal labor-management relations.

124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978). *See also* H.R. Rep. No. 95-1403, *supra* note 81, at 60; S. Rep. No. 95-969, *supra* note 80, at 114.

rejected Proposals IV, V, VI, and VII. Proposal XIII detailed procedures that would have dictated certain personnel assignments in cases involving reductions in force "unless there are persuasive mission related reasons for not doing so, in which case the employer will provide the reasons in writing to the union and to the employee." [124] Concluding that the proposal would "compel the agency to assign an employee to a position on the basis of [the] employee's preference," the Authority held that it would "interfere[] with the discretion which is an essential part of the right to assign under section 7106(a)(2)(A) of the Statute." [125]

Having upheld the Authority's interpretation of the statute as reserving a nonnegotiable agency right to exercise discretion in making personnel assignments, we cannot say that the FLRA wrongly applied that interpretive standard to Proposal XIII. The proposal's exception to mandatory assignment in cases involving "persuasive mission related reasons" might have permitted the FLRA to draw a different conclusion about the scope of discretion that it reserved to management and thus about its negotiability. As we have already said, however, "To sustain the [Authority's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n v. Aragon*, *supra*, 329 U.S. at 153. We need find only that it was not arbitrary, capricious, or contrary to law.[126] Under this deferential

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[124] *Wright-Patterson*, *supra* note 5, at 23-24, *Wright-Patterson* JA at 199-200.

[125] *Id.* at 24, *Wright-Patterson* JA at 200.

[126] Section 7123(c) of the Civil Service Reform Act, 5 U.S.C. § 7123(c), states that judicial review of FLRA decisions shall be in accordance with 5 U.S.C. § 706 (1976). As

standard [127] we have no difficulty in affirming the finding of the FLRA that the proposal would eviscerate an element of discretion protected under Section 7106(a).[128]

Proposal XIV

Review of the FLRA's decision concerning Proposal XIV necessarily involves us, like the Authority, in an examination of federal personnel law and regulations, the two underlying bases for the agency's claim of nonnegotiability.

Proposal XIV concerns the circumstances in which an employee who is temporarily assigned to a higher graded position will be paid at the rate associated with the higher grade. Specifically, the proposal provides that "the employee will receive the rate of pay for the higher position to which assigned, commencing on the 31st day." [129] The FLRA held the proposal to be negotiable. The agency argues otherwise, claiming that adoption of the proposal would require it to violate both statutory law and applicable regulations.

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here relevant, 5 U.S.C. § 706 provides that agency action is to be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). *See Nat'l Federation of Federal Employees v. FLRA*, *supra* note 74, —— F.2d at ——, slip op. at 2-3.

[127] *See, e.g., id.; Ethyl Corp. v. EPA*, 541 F.2d 1, 34-37 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976).

[128] The FLRA's decision that the agency must be able to retain the right to make discretionary choices among candidates for assignment in every case is by no means without support in the legislative history. Representative Udall's analysis of § 7106(a)(2)(C), *quoted in* text at note 120 *supra*, suggests that Congress intended management to retain discretion of this kind.

[129] *Wright-Patterson*, *supra* note 5, at 25, *Wright-Patterson* JA at 201.

In its argument before the FLRA the agency contended that Proposal XIV was contrary to law because it would require payment of employees at grade levels to which they had not been promoted.[130] The Authority accepted the agency's statement of law: that a federal employee is entitled to the pay of a higher graded position only when promoted to it.[131] However, in the absence of contrary indications, the Authority interpreted the union proposal as requiring the employee selected by management to be given a temporary promotion to the position to which assigned.[132] Under this reasonable construction we agree with the FLRA that the agency has not shown the proposal to be inconsistent with applicable law.

The agency also challenges Proposal XIV as incompatible with pertinent federal regulations.[133] The *Federal Personnel Manual*, it asserts, renders nonnegotiable any union proposal—such as this one—that would require a federal agency to make temporary promotions to "encumbered" positions. To make such promotions, the agency argues, it would need to "create" new positions to which employees could be temporarily assigned. And the requirement that it do so, this argument continues, would violate management's statutory prerogative not to bargain over numbers and grades of employees.

Crucial to this argument is the assumption that applicable regulations permit temporary promotions only to existing yet vacant positions. According to the agency, "Unless truly vacant positions exist, temporary

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[130] *See id.* at 26, *Wright-Patterson* JA at 202.

[131] *See id.* (citing cases).

[132] *Id.*

[133] *See* reply brief for petitioners Department of Defense *et al.*, No. 80-1351, at 14-16.

promotions require creation of new positions, which * * * cannot be occupied by two employees simultaneously." [134] We reject the agency's argument because it has failed to persuade us of the truth of this crucial assumption on which the challenge rests.

To support its position the agency relies primarily on a 1925 opinion by the Comptroller General,[135] which held that two employees cannot be "appointed, temporarily or permanently," to the same position.[136] But it fails to reckon adequately with applicable personnel regulations, and indeed with more recent rulings issued by the Comptroller General, which establish that an employee may be temporarily *assigned* to a position without being "*appointed to*" it. Our review of the *Federal Personnel Manual* suggests two procedures through which the requisite temporary assignments might occur.

First, the *Federal Personnel Manual* provides expressly that an employee may be "detailed" to a nonvacant position without being "appointed to" it:

> A *detail* is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the detail. Technically, a position is not *filled* by a detail, as the employee continues to be the incumbent of the position to which detailed.[137]

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[134] Brief for petitioners Department of Defense *et al.*, No. 80-1351, at 23.

[135] It is the duty of the Comptroller General to render decisions regarding the legality of expenditures of appropriated funds to heads of agencies and to certifying and disbursing officers. 31 U.S.C. §§ 75, 82d (1976).

[136] 4 Comp. Gen. 729, 730 (1925). The agency also cites 14 Comp. Gen. 785 (1935).

[137] *Federal Personnel Manual*, ch. 300, subch. 8-1, *quoted in* brief for respondent FLRA, Nos. 80-1351 and 80-1358, at 61 n.51 (emphasis in original).

Recent decisions by the Comptroller General confirm that a position need not be vacant in order for an employee to be "detailed" to it, granted a temporary promotion for the period of the detail, and paid accordingly.[138]

Alternatively, although we recognize that the *Federal Personnel Manual* distinguishes for some purposes between a "detail" and a "temporary promotion," [139] we

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[138] *See* 57 Comp. Gen. 767, 769 (1978); *Matter of Joe F. McLeod—Claim for Backpay*, Comp. Gen. Decision B-191642 (Nov. 17, 1978).

In its brief in this court, *see* brief for petitioners Department of Defense *et al.*, No. 80-1351, at 22, the agency argues that the cases involving "details" are not relevant to the issue before us. It puts its argument on Chapter 312, Subchapter 4-2 of the *Federal Personnel Manual*:

> Situations also arise in which a position is filled but the employee is not present for duty. * * * [In such cases] it is *appropriate* to establish an additional identical position as a basis for assigning another employee to perform these duties. * * *

(Emphasis added.) As construed by the agency, this provision establishes that "details" may not generally be used to effect temporary promotions to encumbered positions. Rather, it says, the provision requires creation of a second position. The flaw in this argument lies apparent in the language of the regulation on which it rests. Although establishment of a second position may sometimes be "appropriate," we are unable to conclude that it is mandatory. We note that the recent decisions of the Comptroller General cited *supra*, which have upheld "temporary promotions" to "detailed" employees and increased pay based thereon, have expressed no worry about the legal propriety of detailing employees to encumbered positions. Details are, of course, limited to 120 days unless prior approval is obtained from the Office of Personnel Management, *see Federal Personnel Manual*, ch. 300, subch. 8-4e.

[139] *See Federal Personnel Manual*, ch. 300, subch. 8-4e ("Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead.").

are unpersuaded that a "temporary promotion" necessarily constitutes an "appointment" that cannot be made in the absence of a "vacancy." Nor do we believe that the Comptroller General—on whose opinions the agency so heavily relies—would conclude otherwise. Indeed, we are influenced in our decision by a recent opinion, upholding the legitimacy of a "detail" to an encumbered position, in which the Comptroller General found support for his conclusion in sections of the *Federal Personnel Manual* dealing with "temporary promotion":

> In addition, FPM chapter 335, subchapter 4, lists some uses of a temporary promotion. Included are situations where an employee has to perform the duties of a position during the extended absence of an incumbent, to fill a position which has become vacant until a permanent appointment is made, to assume responsibility for an increased workload for a limited period, or to participate in a special project which will last for a limited period. In this connection we point out that there is only one example cited which requires a vacant position. Moreover, it is apparent that there is no vacant position when an employee is temporarily promoted to perform the duties of a position during the extended absence of the incumbent.[140]

Finding that the agency has failed to show that adoption of Proposal XIV would be proscribed by applicable law or regulation, we affirm the decision of the FLRA that it was a proper subject of bargaining under the Civil Service Reform Act.

V

For the reasons stated herein, we conclude that the challenged holdings of the FLRA in these three consolidated cases should be upheld and that its orders here before us should be enforced.

Judgment accordingly.

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[140] 57 Comp. Gen. 767, 769 (1978).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1351 and consolidated cases

DEPARTMENT OF DEFENSE, DEPARTMENT OF THE AIR FORCE, AIR FORCE LOGISTICS COMMAND, and AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, INTERVENOR

[Filed Sep. 22, 1981]

BEFORE: Robinson, Chief Judge, Wright, Circuit Judge, Van Pelt,* United States Senior District Judge for the District of Nebraska.

ORDER

On consideration of petitioners' petition for rehearing, it is

ORDERED that the aforesaid petition is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1351 and consolidated cases

DEPARTMENT OF DEFENSE, DEPARTMENT OF THE AIR FORCE, AIR FORCE LOGISTICS COMMAND, and AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, INTERVENOR

[Filed Sep. 22, 1981]

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges, Van Pelt,* United States Senior District Judge for the District of Nebraska.

ORDER

Petitioners' suggestion for rehearing *en banc* has been circulated to the full court and no member of the court, or of the panel, has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-40

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO
(Union)

and

AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO
(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 *et seq.*).

Union Proposal I [1]

ARTICLE 36 DAY CARE FACILITIES

The employer will provide adequate space and facilities for a day care center at each ALC. The union agrees to operate the day care center in a fair and equitable manner. The use of the facilities to be available to all base employees under the terms and conditions of the constitution and by-laws of such facility. The day care center will be self supporting, exclusive of the services and facilities provided by the employer.

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[1] The bargaining unit in this case is a command-wide unit.

Question Here Before the Authority

The question is whether, contrary to the agency's allegation, Union Proposal I concerns "conditions of employment" and, therefore, is within the general scope of the duty to bargain under section 7117 of the Federal Service Labor-Management Relations Statute.[2] If so, the further question is whether the proposal is inconsistent with the

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[2] Section 7117(a)(1) of the Statute provides as follows:

> § 7117. *Duty to bargain in good faith; compelling need; duty to consult*
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

> § 7103. *Definitions; application*
>
> . . . . . .
>
> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .
>
> . . . . . .
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

right of the agency to determine its budget under section 7106(a) of the Statute, as alleged by the agency.[3]

Opinion

Conclusion: Union Proposal I concerns a condition of employment and does not violate the agency's right to determine its budget under section 7106(a) of the Statute. Therefore, it is within the agency's duty to bargain under section 7117 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside.[4]

Reasons: The agency takes the position that the requirement of the proposal that the agency provide space and facilities for a day care center to be run by the union is not a condition of employment affecting unit employees within the meaning of the Statute because the use of agency space for day care facilities has no connection with the employment relationship.

On the contrary, the availability of day care facilities affects the work situation and employment relationship in a variety of significant ways. For example, the existence and availability of such facilities can be determinative of whether an individual will be able to accept a job

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[3] Section 7106(a)(1) of the Statute provides, in relevant part, as follows:

> § 7106. *Management rights*
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management officials of any agency—
>
> (1) to determine the . . . budget . . . of the agency . . . .

[4] In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

with an employer and of whether an employee will be able to continue employment with an employer. Thus, in addition to being an asset to management in recruiting and keeping a stable workforce,[5] such facilities can be a decisive factor in the maintenance by unit employees of an employment relationship. Furthermore, problems with child care arrangements can result in employee tardiness and absenteeism.[6] Thus, they have a detrimental effect on employee use of leave and on employee productivity, resulting in lowered morale and lessened ability to perform satisfactorily in relation to established expectations. It is also noted that, because of the increased number of families in which both parents work, as well as the necessity for single parents to work, the significance of day care facilities to the employment relationship has increased over recent years.[7]

For the foregoing reasons, it is concluded that use of agency space for day care facilities is a condidtion of employment. It is directly related to the personnel pol-

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[5] *Personnel Policies Forum: Turnover and Job Satisfaction*, Survey No. 91, Bureau of National Affairs, Inc., Washington, D.C., 1970.

[6] *Personnel Policies Forum: Absenteeism and Its Control*, Survey No. 90, Bureau of National Affairs, Inc., Washington, D.C., 1970.

[7] *See*, for example, Hayghe, "Marital and family characteristics of workers, March 1977," 101 Monthly Labor Review 51 (Feb. 1978); Bednarzik and Klein, "Labor Force Trends: a synthesis and analysis," 100 Monthly Labor Review 3 (Oct. 1977); Johnson and Hayghe, "Labor force participation of married women, March 1976," 100 Monthly Labor Review 32 (June 1977); Grossman, ". . . Mothers in the labor force," 100 Monthly Labor Review 41 (June 1977); Hayghe, "Families and the rise of working wives—an overview," 99 Monthly Labor Review 12 (May 1976); Hayghe, "Marital and family characteristics of workers," 98 Monthly Labor Review 60 (Jan. 1975).

icies, practices and matters affecting working conditions of unit employees and is within the scope of bargaining under section 7117 of the Statute.

The agency next alleges that Union Proposal I violates its right to determine its budget under section 7106(a)(1) of the Statute because it would require the agency to bear the cost of the space and facilities provided for the day care center. The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation.[8] Whether a proposal

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[8] *See,* for example, the statement of Congressman Clay, one of the proponents of the "Udall substitute," during the House debate on Title VII of the Civil Service Reform Act of 1978:

> Congressman CLAY:
>
> . . . . . .
>
> The Udall substitute contains a management rights clause substantially enlarged beyond that in the committee print. An important element in our agreeing to entrust such an expanded management rights clause to the hands of the new Authority is the example of the protection afforded the collective bargaining process by conscientious scrutiny

directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition.[9] As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them.[10] In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union

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of management claims of infringements on management rights, especially as found in the two 1978 decisions above. If the new Authority is faithful to these interpretative guidelines, the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that *only those proposals that directly and integrally go to the specified management rights* be barred from the negotiations. [Emphasis supplied.]

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan, 124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

[9] *See National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California*, Case No. O-NG-3, 2 FLRA No. 30, (Dec. 13, 1979), Report No. —— at 4 of the decision.

[10] *Webster's Third New International Dictionary* (Unabridged), (1966).

proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Union Proposal I does not on its face prescribe that the agency's budget will include a specific provision for space and facilities for a day care center or a specific monetary amount to fund them. Furthermore, the agency has not demonstrated that Union Proposal I will in fact result in increased costs. On the contrary, the record is that the matter of the cost to the union for space and facilities is subject to further negotiation. It is not necessary, therefore, to reach the issue of whether the alleged costs are outweighed by compensating benefits. Consequently, Union Proposal I does not violate the right of the agency to determine its budget under section 7106(a) of the Statute.

Finally, it is noted that the agency has not adverted to problems which might arise in connection with implementation and administration of an agreement, should it include Union Proposal I, *vis a vis* provisions of ap-

plicable law and Government-wide rule or regulation [11] governing, *e.g.*, the use or allocation of space. Therefore, the Authority makes no ruling as to whether Union Proposal I is consistent with such law or regulation.

Union Proposal II

ARTICLE 28 USE OF OFFICIAL FACILITIES

Section 2. AF Telephone System

For purposes of administering this nationwide agreement and other appropriate official business, the local president, chief steward or their designees will have the use of nationwide Air Force telephone systems at the union office. It is understood that this telephone will be used for conducting proper labor-management relations activities. It will not be used for solicitation of membership or dues or other internal business of AFGE.

Question Here Before the Authority

The question is whether Union Proposal II is outside the agency's duty to bargain under section 7117 of the Statute [12] because it does not relate to the conditions of employment of unit employees and, if not, whether it concerns a matter related to the technology of performing the work of the agency, which under section 7106(b)(1), is negotiable solely at the election of the agency.[13]

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[11] *Cf.* Federal Property Management Regulations, 41 C.F.R. § 101-17.2.

[12] *See* note 2, *supra.*

[13] Section 7106(b)(1) of the Statute provides, in relevant part, as follows:

§ 7106. *Management rights*

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, . . . on the technology . . . of performing work . . . .

Opinion

Conclusion: Union Proposal II is within the agency's duty to bargain under section 7117 of the Statute and does not violate the agency's right to determine the technology of performing its work under section 7106(b)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that the proposal is not within the duty to bargain is set aside.[14]

Reasons: The agency contends, first of all, that union use of the agency's internal phone system for contract administration purposes and other appropriate official business as provided in Union Proposal II is outside the duty to bargain under section 7117 of the Statute because it does not relate to the conditions of employment of unit employees. The contention is without merit.

It is clear from the language of the proposal that the basic purpose for which the phone system would be used by the union relates to the administration of the parties' collective bargaining agreement. As such, the phone system would be a tool to assist in the implementation of the conditions of employment established in that agreement. Thus, since the agency phone system is to be used for labor-management relations purposes, particularly, contract administration, which are matters directly related to the conditions of employment of unit employees, Union Proposal II is within the scope of the duty to bargain under section 7117 of the Statute.

The agency also contends that Union Proposal II interferes with its right under section 7106(b)(1) of the Statute to elect whether it will negotiate over the technology by which work is performed. This contention cannot be sustained. The proposal would not determine

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[14] In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

whether the agency will adopt a particular technology of performing work, *e.g.*, utilize telephones as opposed to some other communications technology in the performance of its work. It merely provides that the union will have access to the system which the agency selected, and which is in existence, for use in connection with contract administration and other labor-management relations matters. Thus, Union Proposal II does not concern a matter which is negotiable only at the election of the agency under section 7106(b)(1). It is within the duty to bargain.

Union Proposals III-VI

ARTICLES 20 & 21 DETAILS & LOANS

Union Proposal III

Section 2. Details to Higher or Same Graded Positions

B. Unless the employer decides to use competitive procedures as outlined in Article —— (Promotions), temporary assignment to higher or same grade/different duty positions shall be offered to qualified and available employees with requisite skills on the basis of seniority within the lowest organizational segment. If senior employees decline and it is necessary to detail an employee, the least senior employee shall be assigned.

Union Proposal IV

Section 3. Details to Lower Graded Positions

Details to lower grade positions will be rotated among qualified and available employees in inverse order of seniority.

Union Proposal V

Section 4. Loans

B. Selection of employees for loans will be equitably rotated among qualified and available employees with requisite skills in inverse order of seniority.

Union Proposal VI

Section 5. Temporary Assignments Outside the Bargaining Unit

B. Where conditions are less at the receiving location than is provided for by this contract, the employee's wishes to decline such assignment will be considered. Selection for such assignments will be equitably rotated in accordance with Section [3] of this Article.

Question Here Before the Authority

The question is whether the union's proposals violate the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute and, with respect to filling positions, to make selections for appointments under section 7106(a)(2)(C) of the Statute.[15] With respect to Union Proposal III, in particular, the question is also whether it is outside the scope of bargaining under sec-

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[15] Section 7106(a)(2) of the Statute provides, in relevant part, as follows:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

. . . . . .

(2) in accordance with applicable laws—

(A) to . . . assign . . . employees in the agency . . . ;

. . . . . .

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source . . . .

tion 7117 of the Statute[16] to the extent that it applies to supervisory positions outside the unit.

Opinion

Conclusion: Union Proposal III is within the scope of bargaining under section 7117 and does not violate either the right of the agency to assign employees under section 7106(a)(2)(A) or its right to make selections for appointments under section 7106(a)(2)(C) of the Statute. Union Proposals IV-VI violate the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that Union Proposal III is not within the duty to bargain is set aside and its allegations that Union Proposals IV-VI are not within its duty to bargain are sustained.[17]

Reasons: The agency alleges that Union Proposal III is outside the scope of bargaining under section 7117 of the Statute because the phrase "higher grade positions" as used in the proposal would include supervisory positions outside the bargaining unit. The agency has misunderstood the proposal. In the first place, Union Proposal III does not on its face apply to supervisory positions. Moreover, the record does not support the allegation that it does. Specifically, the union states that its proposal is intended to apply only to higher graded positions within the bargaining unit. Thus, without deciding whether a proposal relating to details to supervisory positions would be outside the duty to bargain under the Statute, the agency in this case has not shown that Union Proposal III applies to such positions.

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[16] *See* note 2, *supra*.

[17] In so deciding that Union Proposal III is within the duty to bargain, the Authority makes no judgment as to the merits of that proposal.

Next, the agency alleges with respect to each of the above-quoted proposals that it violates the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute because each proposal compels the selection on the basis of seniority of an individual employee for the particular type of assignment specified in the proposal. This allegation has merit in connection with Union Proposals IV, V, and VI.

Union Proposals IV, V, and VI each establish a procedure for the selection of individual employees for assignment by the agency. In particular, under each of the proposals, once the agency has determined the particular qualifications [18] and skills needed to perform the work of the position to which the employee will be assigned, and identified the employees in the unit who meet those requirements and would be available for assignment, selection from among the employees so identified of the particular employee who will be assigned must be on the basis of seniority. That is, depending on the circumstances, the most senior or the least senior employee from among the group of qualified, skilled, and available employees must be selected for the assignment. In thus compelling the selection of a particular individual for temporary assignment to another position, Union Proposals IV, V, and VI each directly interfere with the right of the agency to assign employees. The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under section 7106

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[18] The union indicates that it does not intend the terms "qualified" and "with requisite skills" to mean that an employee must be fully qualified to fill the position on a permanent basis in order to be temporarily assigned under the proposals at issue herein. The proposals are interpreted as consistent with this intent.

(a) (2) (A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position, *i.e.*, the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned. (Clearly, the assignment of an employee to a position is distinguishable from the assignment of an employee to a shift.) A procedure for selecting an employee for assignment solely on the basis of seniority removes from the agency that discretion which, as indicated above, is an essential part of the decision to assign. Union Proposals IV, V, and VI compel the choice of the particular employee to receive an assignment solely on the basis of seniority and thereby directly interfere with the discretion to determine which employee to assign, in violation of section 7106 (a) (2) (A) of the Statute.

Union Proposal III is distinguishable from Union Proposals IV, V, and VI. It specifically would allow the agency the option of utilizing competitive procedures to make the selection. Such competitive procedures reserve the agency's right to select the employee for promotion or assignment from among those available through any appropriate source.[19] Thus, under Union Proposal III,

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[19] Federal Personnel Manual, chap. 335, subchap. 1-4, Requirement 4 provides as follows:

> Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates. They will also provide for management's right to select from other appropriate sources, such as reemployment priority lists, reinstatement, transfer, handicapped, or Veterans Readjustment eligibles or those within reach on an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals.

the agency retains the option of exercising its discretion to select a particular employee for assignment. Only if the agency chooses not to use competitive procedures must it select the individual on the basis of seniority. Because Union Proposal III preserves in this manner the agency's discretion to select, the proposal does not directly interfere with the agency's basic right to assign employees under section 7106(a)(2)(A) of the Statute.

Similarly, Union Proposal III would not be inconsistent with the right of the agency, in filling positions, to make selections for appointments under section 7106(a)(2)(C). That is, assuming, without deciding that the section applies to temporary assignments such as are involved in this proposal, Union Proposal III, as already stated, reserves to the agency the option of exercising its right to select an employee for assignment, from among those available, through any appropriate source.

In summary, Union Proposal III does not conflict with the right of the agency to assign employees under section 7106(a)(2)(A) or with the agency's right to select under section 7106(a)(2)(C) of the Statute and, thus, is within the duty to bargain under the Statute. Union Proposals IV-VI conflict with the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute and, thus, are excluded from the duty to bargain.

Union Proposal VII

ARTICLS 37 MISCELLANEOUS

Section *Mobility*

Prior to invoking the employment mobility requirement, the employer will seek volunteers from among employees of the same title, series and grade. If there are no volunteers, and the employer is required to unilaterally transfer employees within the unit, the employee with the least amount of seniority shall be selected first. The remaining employees shall be transferred in ascending seniority order.

Question Here Before the Authority

The question is whether Union Proposal VII violates the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute.[*]

Opinion

Conclusion: Union Proposal VII violates the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3282 et seq. (1980)), the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: The employment mobility requirement as stated in the proposal refers to the agency program under which employees may be permanently reassigned from one duty station to another. The proposal requires the agency, in the absence of a volunteer for such reassignment, to select the employee to be reassigned on the basis of inverse seniority. That is, the agency is required under the proposal, without the option to do otherwise, as in the case of Union Proposal III, to select for reassignment the least senior employee of the title, series, and grade of the position to be filled. For the reasons stated in the discussion of Union Proposals III-VI, by thus requiring the agency to select an employee for assignment on the basis of seniority the proposal obviates the discretion as to selection which is an essential part of the right to assign under section 7106(a)(2)(A) of the Statute. Accordingly, Union Proposal VII conflicts with the right of the agency to assign employees under section 7106(a)(2)(A) and, thus, is excluded from the duty to bargain.

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[*] See, note 15, *supra*.

Union Proposals VIII and IX

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Union Proposal VIII

Section 2. Air Force Policy and Program Objectives

. . . [T]he employer will establish comprehensive plans and programs, both at command and installation levels, to attain the Air Force objectives.

Union Proposal IX

Section 3. EEO Plans of Action

Section 3 of Article 19 is a multipart proposal which establishes guidelines for the development of affirmative action plans at the command and installation levels. [The proposal is set forth in its entirety in Appendix A. The disputed portions are underscored.]

Questions Here Before the Authority

The questions are, first of all, whether matters relating to discrimination in employment, which are the subject of Union Proposals VIII and IX, are conditions of employment and, hence, are within the scope of the duty to bargain under section 7117 of the Statute;[21] if so, whether such matters pertain to the methods and means of performing the work of the agency, which, under section 7106(b)(1) of the Statute, are negotiable solely at the election of the agency; and, finally, whether particular portions of the proposals violate the right of the

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[21] *See* note 2, *supra.*

agency to determine its organization under section 7106 (a) (1) of the Statute.[22]

Opinion

Conclusion: Union Proposals VIII and IX relate to the conditions of employment of unit employees and are within the scope of the agency's duty to bargain under section 7117 of the Statute. Moreover, the proposals do not concern matters related to the methods and means of performing the work of the agency and, therefore, do not violate section 7106(b) (1) of the Statute. Finally, the proposals do not violate the right of the agency to determine its organization under section 7106(a) (1). Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegations that the disputed proposals are not within the duty to bargain is set aside.[23]

Reasons: The agency alleges, first of all, that the subject matter of Union Proposals VIII and IX, *i.e.*, discrim-

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[22] Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the . . . organization . . . of the agency . . . .

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, . . . on the . . . methods, and means of performing work . . . .

[23] In so deciding that the union's proposals are within the duty to bargain, the Authority makes no judgment as to the merits of the proposals .

ination in employment, is not a condition of employment and therefore is outside the duty to bargain under section 7117 of the Statute. The agency's position is without support in the legislative history of the Statute.

Title VII of the bill reported out of the House Committee (H.R. 11280) contained a definition of the term "conditions of employment" which specifically excluded "policies, practices, and matters relating to discrimination in employment . . . ." [24] The bill passed by the House (the "Udall substitute") did not change this portion of Title VII of the Committee bill insofar as relevant to the issue herein.[25] Title VII of the bill introduced in and passed

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[24] Section 7103 of H.R. 11280 as reported by the House Committee on Post Office and Civil Service provided, in relevant part, as follows:

§ 7103. *Definitions; application*

. . . . . .

(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to discrimination in employment on the basis of race, color, religion, sex, age, national origin, handicapping condition . . . .

[25] Section 7103 of the bill (H.R. 11280) as passed by the House provided, in relevant part, as follows:

§ 7103. *Definitions; application*

. . . . . .

(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to discrimination in employment on the basis of race, color, religion, sex, age, national

by the Senate (S. 2640) did not contain this provision or any provision having a similar effect.[26] The bill which was reported out of the House-Senate Conference Committee, and which was subsequently passed by Congress and signed into law by the President, deleted the portion of the House bill which excluded matters related to discrimination in employment from the definition of "conditions of employment."[27] The Conference Committee Report contains no explanation as to why this provision of the House bill was deleted. Nevertheless, it is reasonable to conclude that the deletion of this exclusion in the bill which was enacted into law indicates that Congress intended such matters to be within the scope of the duty to bargain. If Congress had intended to exclude matters related to discrimination in employment from the duty to

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origin, or handicapping condition, within an agency subject to the jurisdiction of the Equal Employment Opportunity Commission . . . .

[26] *Cf.*, in particular, section 7202, Definitions, of the bill (S. 2640) as passed by the Senate. *See also* section 7215, Representation rights and duties, of the Senate bill.

[27] Section 7103 of the Statute provides, in relevant part, as follows:

§ 7103. *Definitions; application*

. . . . . .

(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute.

bargain it simply could have enacted the House provision unchanged.

Thus, contrary to the agency's allegation, matters related to discrimination in employment, such as are involved in Union Proposals VIII and IX at issue herein, are within the scope of the duty to bargain under section 7117 of the Statute.

The agency next alleges that Union Proposals VIII and IX, by requiring the agency to establish equal employment opportunity plans and specifying the contents of those plans, violate management's right, under section 7106(b)(1) to elect whether it will negotiate on the methods and means by which it performs its work. In particular, the agency argues that these proposals interfere with its right under section 7106(b)(1) to elect whether it will bargain over the ways in which it will fulfill its obligation under law [28] and regulation [29] to implement an equal employment opportunity program. However, assuming without deciding that an agency equal employment opportunity program constitutes a "method" or "means" within the meaning of the Statute, it is clear that an agency's development of such a program is not what is meant in section 7106(b)(1) by the phrase "performing work." The House-Senate Conference Committee Report discussed at length the language regarding methods and means of performing work in section 7106(b)(1) of the Statute. That discussion is of interest insofar as it illustrates some agency activities—*e.g.*, auditing, awarding grants, and research and development —which the conferees considered to constitute agency "work:" [30]

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[28] *See* 42 U.S.C. § 2000e-16.

[29] *See, e.g.*, 5 C.F.R. § 713.201 ff. and Federal Personnel Manual, chap. 713.

[30] S. Rep. No. 95-1272, 95th Cong., 2nd Sess. 154 (1978).

> . . . By inclusion of this language, however, it is not intended that agencies will discuss general policy questions determining how an agency does its work. It must be construed in light of the paramount right of the public to as effective and efficient a Government as possible. For example, the phrase "methods and means" is not intended to authorize IRS to negotiate with a labor organization over how returns should be selected for audit, or how thorough the audit of the returns should be. It does not subject to the collective bargaining agreement the judgment of EPA about how to select recipients for the award of environmental grants. It does not authorize the Energy Department to negotiate with unions on which of the research and development projects being conducted by the Department should receive top priority as part of the Department's efforts to find new sources of energy.

The examples used have a common characteristic: they are each directly and integrally related to the accomplishment of the mission of the agency, *i.e.*, those particular objectives which the agency was established to accomplish. In the instant case, the mission of the organizational segment of the agency involved is logistical support. The union proposals do not go to determining the way in which the agency will perform the particular activities by which it accomplishes that mission. That is, since the equal employment opportunity programs which are the subject matter of these proposals are not directly or integrally related to the provision of logistical support to the Air Force, there is no conflict between these proposals and the right of the agency under section 7106 (c) (1) of the Statute to determine the methods and means of performing its work. Thus, the agency does not have the right to elect whether to bargain on the proposals.

The remaining agency allegation is that these proposals conflict with its right to determine its "organization" under section 7106(a)(1) of the Statute. In particular, the agency contends that the proposals purport to assign specific responsibilities in the area of equal employment opportunity programs to specific agency organizational levels. As a consequence, the agency argues, the proposals are determinative of the functional structure of the agency.

On the contrary, as indicated above, matters related to discrimination in employment are within the agency's duty to bargain under the Statute. That is, an agency is obligated to negotiate with an exclusive representative on those matters, unless otherwise prohibited by law and regulation, at the level of the exclusive recognition.[31] Moreover, in circumstances which involve a comprehensive unit, such as the present case,[32] the agency is also under an obligation to negotiate *at the level of the exclusive recognition* with respect to the particular conditions of employment which will apply at subordinate activities within the unit. That is, the parties may provide in a master agreement at the level of recognition for the nego-

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[31] Section 7114 of the Statute provides, in relevant part, as follows:

> § 7114. *Representation rights and duties*
>
> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit. . . .
>
> . . . . . .
>
> (4) Any agency and any exclusive representative in any appropriate unit, through appropriate representatives shall meet and negotiate in good faith for purposes of arriving at a collective bargaining agreement. . . .

[32] *See* note 1, *supra*.

tiation of supplemental agreements at the local level regarding matters pertaining to the conditions of employment of unit employees at the local level. For example, if the particular agency actions at issue in a proposal could be negotiated, as relevant herein, at the command level, to be performed by the agency at the command level, the Statute does not preclude the parties from providing in a master agreement at the command level for these actions to be performed at the level of subordinate activities within the unit.

Thus, the proposals at issue herein rather than determining the organizational structure of the agency merely require the agency to negotiate the particular activities it will perform at the command level, which is the level of exclusive recognition, in the area of equal employment opportunity and at subordinate levels of the command within the unit. Therefore, these proposals do not conflict with the right of the agency to determine its "organization" under section 7106(a)(1) of the Statute and are within the duty to bargain under the Statute.

Union Proposal X

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Section 5. Utilization of Workforce Skills

The employer will strive to utilize, under current regulations and circumstances, the present skill of each member of the workforce.

A. *Procedures for skills utilization will include the redesigning of jobs where feasible.*

. . . . . .

C. *Where authorized, installation commanders will provide an adequate number of overhires, which will permit individuals with physical or mental handicaps, chronic ailments, illnesses or injuries, and single heads of families who have dependents, to utilize sick*

or annual leave, or LWOP, to handle their responsibilities to themselves and/or dependents without undue impact upon the organizational mission. Supervisors will grant leave in all cases where the need is clearly documented on the request for leave; and use of leave for these purposes will not constitute a basis for leave abuse charges. [Only the underlined portions of the proposal are in dispute.]

Questions Here Before the Authority

The questions are whether, as alleged by the agency, subsection A of Union Proposal X violates the right of the agency to assign work under section 7106(a)(2)(B) of the Statute and whether, as further alleged by the agency, subsection C of the proposal concerns a matter pertaining to the numbers, types, and grades of employees assigned to a tour of duty, which, under section 7106(b)(1) of the Statute, is negotiable solely at the election of the agency.[33]

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[33] Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

. . . . . .

(2) in accordance with applicable laws—

(B) to assign work . . . .

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty . . . .

Opinion

Conclusion: Subsection A of Union Proposal X which relates to the redesign of jobs does not violate the agency's right to assign work under section 7106(a)(2)(B), and is within the duty to bargain;[34] but subsection C of the proposal which relates to an adequate number of overhires violates the agency's right to determine the numbers, types, and grades of employees assigned to a tour of duty under section 7106(b)(1) of the Statute and, thus, is outside the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that Union Proposal X is not within the duty to bargain is set aside in part and sustained in part.

Reasons: The assignment of work to employees or positions is a right reserved to management under section 7106(a) of the Statute. The redesign of a position or a job requires, among other things, a determination of the work which will be assigned to the position or employee involved. Thus, a proposal to redesign a position or job in a particular manner would conflict with management's right to assign work by prescribing the work to be assigned. Subsection A of Union Proposal X, however, does not require the agency to assign or refrain from assigning any particular work. Rather, subsection A merely provides that job redesign would be used as one of the procedures for best utilizing the present skills of unit employees, where this would be feasible. This general operating principle, identifying job redesign as one of the alternative procedures which may be followed where it is feasible to do so, clearly does not infringe on

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[34] In so deciding that subsection A of the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of that portion of the proposal.

the right of the agency to assign work and, thus, is within the duty to bargain.[35]

Turning now to subsection C of Union Proposal X relating to an adequate number of overhires, the express language of this portion of the proposal would determine that each installation must have such overhires and, therefore, directly concerns the numbers of employees assigned to organizational subdivisions of the agency. In this regard, section 7106(b)(1) of the Statute provides that the number of employees may be negotiated only at the election of the agency. In this case, the agency has elected not to negotiate on such matters and, thus, the agency's allegation that this portion of the proposal is not within the duty to bargain is sustained.[36]

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[35] It is noted that this portion of the proposal is entirely consistent with Federal equal employment opportunity policy, as expressed in the Federal Personnel Manual (FPM) concerning the maximum utilization of skills. In this regard, FPM, chap. 713, subchap. 2-4(c) provides in pertinent part:

> c. *Maximum utilization of skills.* The agency shall utilize to the fullest extent the present skills of its employees. Where feasible, the agency shall redesign jobs so that tasks not requiring the full utilization of the incumbents' skills be assigned to jobs with lower skill requirements. This will afford greater opportunity to employees to perfect their skills, while opening up job opportunities for persons with lower skills. . . .

[36] *Cf. National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center*, Case No. O-NG-19, 1 FLRA No. 106, (Sept. 13, 1979), Report No. 16.

Union Proposal XI

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Section 6. EEO Counselors

The employer agrees to provide at each installation trained EEO counselors, who will be available and accessible to all employees, wherever their work station. *Half of the Counselors will be selected from a list provided by the union.* [Only the underlined portion of the proposal is in dispute.]

Question Here Before the Authority

The question is whether the disputed portion of Union Proposal XI violates management rights under section 7106(a)(2)(B) of the Statute and is, therefore, as the agency alleges, not within the duty to bargain.

Opinion

Conclusion: Union Proposal XI violates the right of the agency to assign work under section 7106(a)(2)(B) of the Statute.[37] Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: Agency employees selected as EEO Counselors perform the duties associated with EEO counseling either as their total work assignment or in addition to the other duties which are regularly assigned to them and which comprise their appointed positions. Thus, the determination to select a particular employee as an EEO counselor is in reality a decision to assign certain duties, in this situation EEO counselor duties, to that employee. In this regard, the agency retains the right under section 7106(a)(2)(B) of the Statute to assign work to posi-

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[37] *See* note 33, *supra*.

tions or employees. The disputed portion of the proposal, however, mandates that the agency assign EEO counselor duties to a certain percentage of employees selected by the union, to the exclusion of other agency employees. Thus, since the disputed portion of the proposal directly prescribes the assignment of certain duties to particular employees, and, in effect, precludes the assignment of those duties to other employees, it conflicts with section 7106(a)(2)(B) of the Statute. Hence, the agency's allegation that the disputed portion of the proposal is not within the duty to bargain is sustained.

Union Proposal XII[28]

ARTICLE 33 NEGOTIATIONS DURING THE TERM OF THIS AGREEMENT

Section 3. Mid-Term Negotiations

. . . . . .

A. *Mid-Term Negotiations at Command AFLC Level*

. . . . . .

7. Should the union choose to submit the issue to the FSIP the employer will not, except for overriding exigencies or unreasonable delay of implementation of management rights, implement the change before the Panel has completed its work.

8. Should the employer unilaterally implement the change in accordance with Section 7 above before the Panel has completed its work the decision of the Panel will be applied retroactively to the date of implementation.

. . . . . .

B. *Mid-Term Negotiations at Local Level*

. . . . . .

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[28] The portions of the proposal set forth herein are those which are in dispute. The whole proposal is set forth in **Appendix B.**

6. Should the parties fail to reach agreement after mediation, the employer may unilaterally implement change, provided a minimum of 15 days advance notice has been given to the union. If the union chooses to submit the issue to the Federal Service Impasses Panel during this period, except for overriding exigencies or unreasonable delay of implementation of management rights, the employer will not implement the change and will maintain the status quo until the Panel has completed its dispute resolution process.

7. Should the employer unilaterally implement the change in accordance with Section 6 above, the decision of the Panel will be applied retroactively to the date of implementation.

Question Here Before the Authority

The question is whether the portions of the proposed procedures for mid-term negotiations set forth above would violate management rights under section 7106 of the Statute, as alleged by the agency.

Opinion

Conclusion: The dispute portions of Union Proposal XII herein establish a negotiable procedure under section 7106(b)(2) of the Statute.[20] Accordingly, pursuant to

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[20] Section 7106(b)(2) of the Statute provides as follows:

§ 7106. *Management rights*

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

. . . . . .

(2) procedures which management officials will observe in exercising any authority under this section. . . .

. . . . . .

section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that those portions of Union Proposal XII are not within the duty to bargain is set aside.[40]

Reasons: The agency objects, first of all, to that aspect of Union Proposal XII which would require, in effect, that the agency hold in abeyance implementation of any proposed change in conditions of employment during the term of the agreement pending the decision of the Federal Service Impasses Panel on matters referred to it by the parties, except in circumstances involving an "overriding exigency" or "unreasonable delay" of implementation of management rights. The agency argues that this requirement would result in unreasonable delays in the exercise of any management right which might be involved and that, for this reason, these provisions of the proposed procedures are contrary to the Statute. The agency position is without merit.

First, the plain language of the proposal would permit the agency to implement any change in conditions of employment in circumstances where holding the action in abeyance as required by the proposal would result in unreasonable delays in the exercise of management rights. Moreover, contrary to the agency's argument that the Statute imposes a more stringent standard of delay than that in the proposals, the Authority, in the *Dix-McGuire Exchange* case,[41] rejected the contention that the statutory standard for determining whether a proposed procedure is within the duty to bargain is whether it would

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[40] In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

[41] *American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, Case No. O-NG-20, 2 FLRA No. 16, (Nov. 29, 1979), Report No. ——.

result in an unreasonable delay in the implementation of management rights. In its decision, the Authority stated as follows:[42]

> . . . The legislative history of the Statute, as it pertains to subsection (b) (2), reveals, first of all, that the Committee on Conference, in adopting the bill which subsequently was enacted by Congress and signed into law by the President, specifically rejected a provision of the Senate bill (S. 2640) which provided that negotiation on procedures should not "unreasonably delay" so as to "negate" the exercise of management's reserved rights. The conclusion is justified, therefore, that Congress did not intend subsection (b) (2) to preclude negotiation on a proposal merely because it may impose on management a requirement which would delay implementation of a particular action involving the exercise of a specified management right. Rather, as the Conference Report indicates, subsection (b) (2) is intended to authorize an exclusive representative to negotiate fully on procedures, except to the extent that such negotiations would prevent agency management from acting at all. That is, insofar as it is consistent with the right of management ultimately to act, Congress intended the parties to work out their differences with regard to procedures in negotiations. [Footnotes omitted.]

Thus, the statutory standard is whether adoption of the proposed procedure, through negotiations, will prevent the agency from acting at all. The proposal in the *Dix-McGuire Exchange* case required the agency to stay the suspension or removal of an employee pending completion of the contractual grievance procedure, including arbitration. The Authority determined that while the proposal would delay agency action, it would not prevent

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[42] *Ibid* at 2-4 of the decision.

the agency from acting at all and found this proposal to be within the duty to bargain. The proposal in this case, like that in *Dix-McGuire Exchange*, would require the agency to hold in abeyance its proposed action—in this instance, pending completion of the procedures of the Panel. However, the proposal herein, as distinguished from *Dix-McGuire Exchange*, would permit the agency to implement that proposed action before the completion of the Panel procedures in circumstances which involve an "overriding exigency" or an "unreasonable delay" in the exercise of management rights. As such, the proposal at issue herein is less restrictive of management rights than that in *Dix-McGuire Exchange* and, *a fortiori*, would not prevent the agency from acting at all pursuant to those rights.[43] In this respect, then, it is a negotiable procedure under section 7106(b)(2) of the Statute.

The agency objects, further, to that portion of the union's proposal which (in those situations where the agency, consistent with the "overriding exigency" and "unreasonable delay" provisions, implements its proposed action prior to the completion of the Panel procedures) requires that the decision of the Panel be applied retroactively to the date of the agency action. Specifically, the agency argues that the retroactivity requirement would cancel the actions taken in the exercise of any management right involved. To the extent that this is an argument that the retroactivity requirement would have the effect, contrary to the Statute, of preventing the agency from acting at all, it misconstrues the effect of the proposal. The plain language of this part of the proposal and the record herein indicate that the proposal is not intended to nullify the action itself, *i.e.*, the exercise of the management right, but to retroactively apply the Panel decision as to the procedures to be followed in the implementation

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[43] *Cf. National Treasury Employees Union, Chapters 103 and 111 and U.S. Customs Service, Region VII*, Case No. O-NG-16, 2 FLRA No. 15, (Nov. 29, 1979), Report No. ——.

of the action and the appropriate arrangements to be made for employees adversely affected by the action. In this respect, the effect of the retroactivity requirement would be analogous to the effect of a judgment that an agency must re-run, *e.g.*, a reduction in force or a promotion action in order to comply with legal or regulatory requirements. That is, the right of the agency to take the action is not in question, only the manner in which the action was implemented. Thus, the requirement that the decision of the Panel be applied retroactively as of the date of the agency action would not in and of itself prevent the agency from acting at all in the circumstances described in the proposals.

Moreover, neither the language of the proposal nor the record in the case indicates an intent for the proposal to require that retroactive application of the decision of the Panel must occur if such application would be inconsistent with applicable law and regulation.

Thus, for the foregoing reasons, Union Proposal XII establishes a negotiable procedure under section 7106(b)(2) of the Statute which management officials will observe in the exercise of management rights during the term of the agreement.

Union Proposal XIII

ARTICLE 16 REDUCTION IN FORCE

Section 6.

B. Prior to any placement actions, the employer will establish lists of positions by grade, title, series, career potential and location into which personnel may be entitled to bump or retreat. Lists will contain all vacant positions and will be updated weekly. These lists will be made available to all individuals determined to be affected by the RIF. All affected employees will be offered an opportunity to list the preferred positions desired in each grade, in order

of preference. The employer will assign employees, in retention order, to positions of preference for which qualified, in the order of preference, unless there are persuasive mission related reasons for not doing so, in which case the employer will provide the reasons in writing to the union and to the employee.

Question Here Before the Authority

The question is whether Union Proposal XIII violates the right of the agency to assign employees in the agency under section 7106(a)(2)(A) of the Statute.[44]

Opinion

Conclusion: Union Proposal XIII violates the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that the proposal is not within the agency's duty to bargain is sustained.

Reasons: Union Proposal XIII requires the agency, where there are employees subject to a reduction in force (RIF) who are entitled under applicable regulations[45] to an offer of assignment to another position, to assign those employees to the positions to which they are entitled on the basis of employee preference. As a practical matter, the proposal would apply primarily in circumstances where there are vacant positions for which an employee is qualified[46] and where there is more than one position

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[44] *See* note 15, *supra*.

[45] *See* 5 C.F.R. §§ 351.701-351.705. *See also* Federal Personnel Manual, chap. 351, subchap. 7.

[46] 5 C.F.R. § 351.201(b). *See also* Federal Personnel Manual, chap. 351, subchap. 7-1.b.

to which the employee has assignment rights,[47] since these are the circumstances under applicable regulations in which the agency has discretion as to the reassignment of employees in a reduction in force.[48] However, in these circumstances, the proposal would compel the agency to assign an employee to a position on the basis of that employee's preference. That is, the agency would be required to forego its discretion as to the selection of the employee to be assigned to that position. The Authority held in connection with its consideration of Union Proposals III-VII above, that the right of the agency to assign employees includes discretion as to the selection of the particular employee to be assigned. Thus, as discussed more fully in connection with Union Proposals III-VII, herein, since Union Proposal XIII, in the circumstances described, would compel the selection of a particular employee for assignment, it interferes with the discretion which is an essential part of the right to assign under section 7106(a)(2)(A) of the Statute. Therefore, it is outside the duty to bargain.

Union Proposals XIV and XV

ARTICLE 13 TEMPORARY PROMOTIONS

Union Proposals XIV

Section 2. Temporary Promotion to Encumbered Positions

When an employee is temporarily assigned to an encumbered, but temporarily vacant bargaining unit position of a higher grade for 30 days, the employee will receive the rate of pay for the higher position to which assigned, commencing on the 31st day.

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[47] *See* Federal Personnel Manual, chap. 351, subchap. 7-3.c.(3).

[48] *See* Federal Personnel Manual, chap. 351, subchap. 7-3.c.(1)-(2).

Union Proposal XV

Section 3. Assignment of Duties of a Higher Graded Position

When an employee is temporarily assigned the duties of a higher graded position for 30 consecutive days, the employee will receive the rate of pay for the higher position to which assigned, commencing on the 31st day.

Questions Here Before the Authority

The questions are whether Union Proposal XV is outside the scope of bargaining under section 7117 of the Statute [49] to the extent that it applies to supervisory positions and whether Union Proposals XIV and XV, as they apply to unit positions, are contrary to the law governing compensation of Federal employees.[50]

Opinion

Conclusion: Union Proposal XV is within the scope of bargaining under section 7117 of the Statute and Union Proposal XIV and Union Proposal XV do not conflict with the law governing compensation of Federal employees. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegation that the disputed proposals are not within the duty to bargain is set aside.[51]

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[49] *See* note 2, *supra.*

[50] The agency cites *United States* v. *Testan, et al.*, 424 U.S. 392, 406 (1976) and *Dianish, et al.* v. *United States*, 183 Ct. Cl. 702 (1968).

[51] In so deciding that the proposals are within the duty to bargain, the Authority makes no judgment as to the merits of the proposals.

Reasons: These two proposals require, respectively, that unit employees temporarily assigned to an encumbered but temporarily vacant higher graded position and temporarily assigned to perform the duties of a higher graded position be compensated at the rate appropriate to such higher graded positions after certain specified time periods. The agency alleges with respect to Union Proposal XV that it is outside the duty to bargain to the extent that the higher graded positions referred to therein are intended to include supervisory positions outside the bargaining unit. The allegation cannot be sustained.

First of all, the proposal does not on its face apply to supervisory positions. However, even assuming that it did, the proposal would be within the duty to bargain under the Authority's decision in the *Naval Air Rework Facility* case [52] regarding a substantially identical proposal: [53]

> In this regard, the act called for by the proposal, of providing compensation to the employee at the level commensurate with the job he or she is performing (*i.e.*, temporarily promoting the employee), simply is a ministerial act implementing management's decision to select and assign the employee involved to the higher graded position. As previously indicated, nothing in the proposal would interfere with man-

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[52] *Methods and Standards Association and Naval Air Rework Facility, Naval Air Station, Pensacola, Florida*, Case No. O-NG-41, 2 FLRA No. 34, (Dec. 21, 1979), Report No. ——.

[53] The proposal at issue in the *Naval Air Rework Facility* case provided as follows:

> Unit employees who are non-competitively, temporarily assigned the duties of a higher grade position over a period of five days or more will receive the pay authorized for the higher grade position.

agement's right to make such decision to select and assign. Thus, nothing in the proposal would impair management's right to determine whether and whom temporarily to promote.

Similarly, the agency argument that these proposals, contrary to law, would require the agency to compensate employees, in the circumstances specified in the proposals, at the rate of pay of the higher graded positions without having temporarily promoted them to these positions, is without merit.

The agency is correct in its statement of the law as requiring promotion as a prerequisite to the higher compensation.[54] However, the agency has failed to show that the proposals would require it to pay employees the higher rate without having temporarily promoted those employees or that temporary promotions under the circumstances specified in the proposals would be contrary to law or regulation. On the contrary, absent an indication in the proposal itself or in the record in the case that the union intended otherwise, given the law as stated above, the requirement that the employee receive the higher rate of pay is tantamount to a requirement that the employee who has been selected by management be temporarily promoted to the higher graded position.

In this regard, as is implicit in the *Naval Air Rework Facility* case, cited above, unless the proposal specifically provides or the record indicates otherwise, the requirement that an employee temporarily serving in or performing the duties of a higher graded position be paid the rate of pay of the higher graded position must be interpreted as consistent with applicable law, that is, as requiring that the employee be temporarily promoted to that position.

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[54] *See, e.g., Coleman* v. *United States*, 100 Ct. Cl. 41 (1943); *Desmond* v. *United States*, 201 Ct. Cl. 507 (1973); 54 Comp. Gen. 263 (1974); 57 Comp. Gen. 336 (1978).

Moreover, the agency has not shown that a temporary promotion in the circumstances described in the proposals in any other manner would be contrary to law and regulation. In particular, the agency has provided no evidence to support its claim that Union Proposal XIV could be interpreted to require the establishment of another position. Certainly, the proposal itself does not require such action for implementation and the agency produces no evidence to support a conclusion that it would be precluded by law or regulation from temporarily promoting an employee to an encumbered but temporarily vacant position. In short, the agency has not demonstrated that the proposals, by requiring the agency to compensate employees at the rate of a higher graded position under the circumstances specified, are contrary to law and regulation. Therefore, the proposals are within the agency's duty to bargain under the Statute.

Union Proposal XVI

ARTICLE 13 TEMPORARY PROMOTIONS

Section 5. Alternate Foreman Selection

An alternate foreman/supervisor is a production employee of journeyman grade level selected by the foreman/supervisor to ensure continuity of functions while the foreman/supervisor is absent.

(a) Selection of alternate foreman/supervisors shall be rotated among journeymen and workleader employees volunteering to act in this capacity. Designations will be equitably rotated on a seniority basis (service computation date). The initial selection will be the employee with the most seniority, unless the employee declines. The remaining employees will be utilized in descending order according to their seniority.

(b) Each employee so designated will serve until they have accumulated 30 days of experi-

ence of acting foreman/supervisor. Employees who are designated as an alternate foreman/supervisor will have this assignment recorded by the employer on the employee's AF 971 file. Every accumulative 30 workdays in which the employee has served as acting foreman/supervisor will be certified on an SF 52 form and recorded on the employee's official personnel file.

(c) Temporary promotions will be made when employees perform the duties of these positions for 30 days or more.

Questions Here Before the Authority

The questions are, first of all, whether subsections (a) and (b) of Union Proposal XVI violate management rights under section 7106(a)(2) of the Statute, and, secondly, whether subsection (c) violates the law governing compensation of Federal employees, as alleged by the agency.

Opinion

Conclusion: Subsections (a) and (b) of Union Proposal XVI violate the right of the agency to assign work under section 7106(a)(2)(B) of the Statute,[55] and subsection (c) of the proposal violates the law governing compensation of Federal employees.[56] Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 *et seq.* (1980)), the agency's allegations that Union Proposal XVI is not within the duty to bargain is sustained.

Reasons: According to the record in this case, there is no established position of "alternate foreman/supervisor." Rather, it appears that the term refers to circumstances

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[55] *See* note 33, *supra*.

[56] *United States* v. *Testan, et al.*, 424 U.S. 392, 406 (1976); *Dianish, et al.* v. *United States*, 183 Ct. Cl. 702 (1968).

in which certain of the duties incident to an established supervisory position are assigned to unit employees on an *ad hoc* basis during the temporary absence of the supervisor. Subsections (a) and (b) of Union Proposal XVI concern the selection of unit employees to perform the subject supervisory duties. In particular, they would compel the assignment of certain supervisory duties to employees on the basis of seniority or, once such duties were assigned, prevent the assignment of those duties to other employees before a specified time period had elapsed. In other words they would eliminate the discretion inherent in the right to assign work under section 7106(a)(2)(B) of the Statute. The right to assign work includes discretion as to the particular employee to whom it will be assigned. Thus, since subsections (a) and (b) of the proposal would directly interfere with the agency's right to assign work to particular employees, the agency's allegation that these sections are not within the duty to bargain is sustained.

Moreover, as previously indicated, the term "alternate foreman/supervisor" does not refer to an established position but to the performance of some of the duties incident to a supervisory position by unit employees on an *ad hoc* basis. It is well settled that a Federal employee is entitled to receive only the salary of the position to which he or she was appointed even though he or she may have performed duties of another position.[57] In the instant case, however, unit employees are merely performing some of the duties incident to a supervisory position on an *ad hoc* basis rather than being assigned to an established supervisory position. No basis exists under Federal personnel law to support a temporary promotion in these circumstances. Therefore, subsection (c) of

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[57] *See* Federal Personnel Manual, chap. 511, subchap. 1-6; 55 Comp. Gen. 1062 (1976); *United States* v. *Testan, et al.*, 424 U.S. 392, 406 (1976).

Union Proposal XVI, by requiring such temporary promotion is inconsistent with applicable law. Consequently, the agency's allegation that subsection (c) of the proposal is not within the duty to bargain is sustained.

Issued, Washington, D.C., January 31, 1980

/s/ Ronald W. Haughton, Chairman

/s/ Henry B. Frazier III, Member

/s/ Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Attachments:

Appendices

APPENDIX A

Union Proposal IX

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Section 3. EEO Plans of Action

Each AFLC subordinate activity will develop appropriate plans of action which will specifically address: (1) All personnel functions which impact equal employment opportunity for any employees; (2) existing problems; and (3) foreseen future problem areas. Union input to these plans will be requested at appropriate times in their development, and ideas from union representatives will be solicited concerning various aspects of the plans as they are developed. *Negotiations of these plans will be scheduled promptly when requested by the union.*

A. *The AFLC Plan. The AFLC EEO Plan will contain provisions to insure that commanders at all activities will develop comprehensive plans which will reflect a full commitment toward the realization of full equal employment opportunity for all their employees. The AFLC plan will state command policies and objectives and establish command goals. (1) It is agreed that the command will, at least quarterly, review reports on installation and command progress toward realization of all objectives and goals, and will provide assessments of progress, and appropriate guidance to subordinate commanders on a timely basis.* Such reports will be forwarded to the Council President within 10 days of service on Local Commander.

(2) *Annually, the command will consolidate data of the year's progress, and issue assessments of progress toward the command's objectives and goals, and those of each subordinate commander, with appro-*

priate further guidance. A copy of the report will be furnished to the Council President.

(3) *The AFLC Plan will direct activity commanders to develop plans which will reflect the commitment of their management to all Air Force policies and objectives in support of full equal employment opportunity. These policies and objectives will direct the inclusion of provisions to:*

a. *Make every effort to eliminate every vestige of local prejudice and discrimination.*

b. *Issue a statement to employees indicating management's commitment to achieve that goal.*

c. *Take actions to assure that all sources of qualified minority group applicants understand the EEO Program.*

d. *Develop plans to establish and maintain contacts with the minority work force and community groups and to participate in cooperative action with schools, universities, and other public and private groups to improve employment opportunities and conditions affecting employability.*

e. *Insure vigorous performance in the positive application of the policy of equal opportunity by supervisory and managerial personnel who direct the activities of employees covered by this agreement.*

f. *Make maximum effort to assure all employees and recognized employee organizations understand the policies and program.*

g. *Consider and adjudicate complaints of discrimination carefully, justly, and expeditiously.*

h. *Brief new key staff personnel and emphasize their responsibility for implementing the EEO Program.*

i. *Include the subject of equal employment opportunity in all supervisory development programs.*

j. *During orientation programs, insure all persons understand all personnel actions are on a merit basis without regard to race, color, religion, sex, or national origin.*

k. *Seek the support and cooperation of management with EEO counselors and other officials in bringing about informal resolutions of complaints.*

B. *Activity EEO Plans of Action. Development of each activity's EEO annual plan of action will be done in a timely manner, will be complete, comprehensive, and adequate in response to the assessments of EEO problems. Prior to implementation, it will be submitted to the union for review. The union may submit proposals on the plan and shall negotiate the plan in accordance with Article —— Supplemental Agreements. The parties agree that each activity EEO Plan will contain information which will focus on special personnel functions and existing problems, and foreseen potential problems. It will specifically examine the following areas:*

1. *Adequate organization and resources to administer the command EEO program in a positive and effective manner, with criteria for staffing that will assure effective performance in all program aspects, including affirmative action and processing of discrimination complaints.*

2. *An analysis of relevant statistical data on the agency workforce to show composition of the agency's and subordinate organization's workforce by racial, ethnic and sex groupings at the various grade levels.*

3. *Data to show the composition of each major occupation (job series) by racial, ethnic and sex groupings at the various grade levels.*

4. A survey of current skills and training of the command's workforce, and the labor market which the installation uses as its recruiting source, to determine the availability of employees, including minorities and women, having skills required to meet staffing needs. This data will also be available for use in identifying under-utilized employees so they may be considered for positions which will make full use of their skills, training and experience.

5. Turnover information analyzing voluntary and involuntary actions, to determine the characteristics of those employees leaving Air Force employment and those hired as replacements.

6. The number and kinds of jobs expected to be filled in the coming year, based on a review of past turnover rates in each of the major occupations, and anticipated expansion or contraction of programs.

7. Career progression by organization and grade to ascertain whether the percentages of minority and non-minority eligibles for promotion are appearing on promotion certificates and whether an appropriate number are being selected.

8. Training opportunity allocations to insure they are being allotted on an equitable basis and the results of such training experiences are considered equitably for minority and non-minority career progression.

9. Selection for jobs to ascertan whether irrelevant characteristics may discriminate against a particular group of employees.

10. Utilization of information by occupational area and grades to determine whether different groups are not being fully used by virtue of past work or training experience, educational achievement, or other capabilities. This area should also include studies of time in grade before promotion,

input grade as related to training, skills, and education.

11. *Studies of organizational makeup to determine whether existing grades and occupations indicate past or continuing inequality of employment conditions.*

12. *Continuing review of awards and disciplinary actions by grade, occupation and by organization.*

13. *The designation of groups of positions to provide opportunities for employees to enhance their skills, perform at their highest potential and advance in accordance with their abilities through a formal upward mobility program. Specifics of installation upward mobility programs will be negotiated locally.*

14. *Attitude measurement of the workforce and toward the activity EEO program. It will incorporate attempted solutions to specific, identified problems and describe them in terms of specific activities, responsibilities, and target dates. Follow-up studies will be performed to determine the results of the implemented solutions.*

15. *A continuing review and analysis by organization of the sources of and the kinds of discrimination complaints received and how they reflect on practices and policies that might result in unequal or preferential treatment.*

16. *Two special emphasis areas will be covered in each plan, as appropriate. They are: (1) Air Force Federal Women's Program 1 and (2) Spanish-speaking Program. The first will recognize and lend visibility to matters affecting the employment and utilization of women in the Air Force. The second is to assure equal opportunities in Air Force employment of the Spanish-speaking population, and to eliminate barriers against full equal opportunity for this group.*

APPENDIX B

Union Proposal XII

ARTICLE 33 NEGOTIATIONS DURING THE TERM OF THIS AGREEMENT

Section 3. Mid-Term Negotiations

Any proposed change implementing new or changes to existing DoD or Air Force regulations or proposed changes to AFLC or ALC regulations resulting in changes in personnel policies, practices, or matters affecting working conditions not specifically covered in this agreement will not be implemented without prior written notification and negotiation with the union as prescribed below or in Article —, (Negotiations of Supplemental Agreement.) Notifications will include a copy of the proposed change and a detailed explanation of what is proposed.

A. *Mid-Term Negotiations at Command AFLC Level.* Negotiations of Supplemental Agreement, or if the employer desires to make changes in personnel policies, practices, or working conditions prior to the annual contract reopener authorized by Article —— (Duration of Agreement.) The following procedures apply:

1. The employer shall serve by certified mail on the Council President and each Local President a copy of the proposed change and a brief rationale on the reasons for the change.

2. The Council President or his designee shall notify the AFLC Commander when the union chooses to negotiate on the change. Notice must be served on the AFLC Commander 20 calendar days after receipt of the proposed change.

3. Negotiations shall begin within 30 days from notice of the union's demand to bargain. Mid-term

negotiations not conducted at the annual reopener shall be held at Headquarters AFLC, Dayton, Ohio or other ALC upon mutual agreement of the parties. Travel and per diem for union representatives, who are Air Force Employees, shall be paid by the employer. The number of union representatives for whom travel and per diem will be paid shall not exceed the number of management representatives.

4. The parties will negotiate five days a week for eight hours a day.

5. Should the parties fail to reach agreement after two weeks of negotiations, including mediation, the AFLC shall notify the union in writing of its intention to implement its proposal(s).

6. The union may submit the issue to the FSIP for resolution within 15 days of receipt of the notice to implement.

7. *Should the union choose to submit the issue to the FSIP the employer will not, except for overriding exigencies or unreasonable delay of implementation of management rights, implement the change before the Panel has completed its work.*

8. *Should the employer unilaterally implement the change in accordance with Section 7 above before the Panel has completed its work the decision of the Panel will be applied retroactively to the date of implementation.*

9. The impasse procedure of 5, 6, 7, 8, and above will apply when the employer chooses to negotiate on mid-term changes at the annual reopener.

10. All changes to personnel policies and practices or matters affecting working conditions negotiated at the command level shall become supplements to this Agreement and remain in effect for its duration as prescribed in Article ——, Duration.

B. *Mid-Term Negotiations at Local Level.* For Directorate level matters and above, the union will have 14 calendar days after the proposed changes are received to respond to such proposals. For other proposed changes, if the union does not respond within the time period stated above, the employer may implement the proposed changes. The union may request a meeting to negotiate with the employer in accordance with the following procedures:

1. The designated union representative shall submit a written request for a meeting to the responsible management official in response to the employer's notification of a proposed change.

a. The designated union representative for matters below division level will be the division steward.

b. The designated union representatve for matters at the division level shall be the directorate steward.

c. On matters at the directorate level, the designated union representative is the Chief Steward.

d. Matters which have activity-wide impact will be negotiated by the President of the union.

e. In the absence of an appropriate designated union representative, the union will name a representative to attend the meeting who will have the authority to bind the union.

f. The designated steward at the next lower organization level where the change is proposed may attend the meeting if desired by the union.

2. Activity-wide mid-term contract changes negotiated between the President of the union and the Commanding Officer or their designees shall be incorporated into local supplements and remain in effect for the duration of local supplement unless the par-

ties agree to a different duration term on a specific activity-wide mid-term change.

3. Attendance at such meetings shall be on official time for employees who would otherwise be in a duty status. Such official time will be in accordance with Title VII.

4. Only the designated union representative shall have the authority to bind the union on such accords that may be reached at these meetings. These accords may not conflict with existing provisions of this agreement.

5. The meeting will normally take place within three days after the union's request for a meeting is received.

6. *Should the parties fail to reach agreement after mediation, the employer may unilaterally implement change, provided a minimum of 15 days advance notice has been give to the union. If a union chooses to submit the issue to the Federal Service Impasses Panel during this period, except for overriding exigencies or unreasonable delay of implementation of management rights, the employer will not implement the change and will maintain the status quo until the Panel has completed its dispute resolution process.*

7. *Should the employer unilaterally implement the change in accordance with Section 6 above, the decision of the Panel will be applied retroactively to the date of implementation.*

APPENDIX D

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

(Chapter 71 of Title 5 of the U.S. Code
and Related Amendments to 5 U.S.C. 5596(b)
the Back Pay Act)

TITLE VII—FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

Federal Service Labor-Management Relations

SEC. 701. So much of subpart F of part III of title 5, United States Code, as precedes subchapter II of chapter 71 thereof is amended to read as follows:

"Subpart F—Labor-Management and Employee Relations
"Chapter 71—Labor-Management Relations

"SUBCHAPTER I—GENERAL PROVISIONS

"Sec.

"7101. Findings and purpose.
"7102. Employees' rights.
"7103. Definitions; application.
"7104. Federal Labor Relations Authority.
"7105. Powers and duties of the Authority.
"7106. Management rights.

"SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

"Sec.

"7111. Exclusive recognition of labor organizations.
"7112. Determination of appropriate units for labor organization representation.

"7113. National consultation rights.

"7114. Representation rights and duties.

"7115. Allotments to representatives.

"7116. Unfair labor practices.

"7117. Duty to bargain in good faith; compelling need; duty to consult.

"7118. Prevention of unfair labor practices.

"7119. Negotiation impasses; Federal Service Impasses Panel.

"7120. Standards of conduct for labor organizations.

"SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

"Sec.

"7121. Grievance procedures.

"7122. Exceptions to arbitral awards.

"7123. Judicial review; enforcement.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"Sec.

"7131. Official time.

"7132. Subpenas.

"7133. Compilation and publication of data.

"7134. Regulations.

"7135. Continuation of existing laws, recognitions, agreements, and procedures.

"SUBCHAPTER I—GENERAL PROVISIONS

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) Experience in both private and public employment indicates that the statutory protec-

tion of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

"§ 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise pro-

vided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

"§ 7103. Definitions; application

"(a) For the purpose of this chapter—

"(1) 'person' means an individual, labor organization, or agency;

"(2) 'employee' means an individual—

"(A) employed in any agency; or

"(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determinded under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

"(i) an alien or noncitizen of the United States who occupies a position outside the United States;

"(ii) a member of the uniformed services;

"(iii) a supervisor or a management official;

"(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or

"(v) any person who participates in a strike in violation of section 7311 of this title;

"(3) 'agency' means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

"(A) the General Accounting Office;

"(B) the Federal Bureau of Investigation;

"(C) the Ceneral Intelligence Agency;

"(D) the National Security Agency;

"(E) the Tennessee Valley Authority;

"(F) the Federal Labor Relations Authority;
or

"(G) the Federal Service Impasses Panel;

"(4) 'labor organization' means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an

agency concerning grievances and conditions of employment, but does not include—

"(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

"(C) an organization sponsored by an agency; or

"(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

"(5) 'dues' means dues, fees, and assessments;

"(6) 'Authority' means the Federal Labor Relations Authority described in section 7104(a) of this title;

"(7) 'Panel' means the Federal Service Impasses Panel described in section 7119(c) of this title;

"(8) 'collective bargaining agreement' means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

"(9) 'grievance' means any complaint—

"(A) by any employee concerning any matter relating to the employment of the employee;

"(B) by any labor organization concerning any matter relating to the employment of any employee; or

"(C) by any employee, labor organization, or agency concerning—

"(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

"(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

"(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;

"(11) 'management official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

"(12) 'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit

in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

"(13) 'confidential employee' means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

"(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

"(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

"(B) relating to the classification of any position; or

"(C) to the extent such matters are specifically provided for by Federal statute;

"(15) 'professional employee' means—

"(A) an employee engaged in the performance of work—

"(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

"(ii) requiring the consistent exercise of discretion and judgment in its performance;

"(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

"(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

"(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

"(16) 'exclusive representative' means any labor organization which—

"(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

"(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

"(i) on the basis of an election, or

"(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

"(17) 'firefighter' means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

"(18) 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

"(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

"(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

"(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

"(2) The President may issue an order suspending any provision of this chapter with

respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

"§ 7104. Federal Labor Relations Authority

"(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

"(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority.

"(c) (1) One of the original members of the Authority shall be appointed for a term of 1 year, one for a term of 3 years, and the Chairman for a term of 5 years. Thereafter, each member shall be appointed for a term of 5 years.

"(2) Notwithstanding paragraph (1) of this subsection, the term of any member shall not expire before the earlier of—

"(A) the date on which the member's successor takes office, or

"(B) the last day of the Congress beginning after the date on which the member's term of office would (but for this subparagraph) expire.

An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced.

"(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

"(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

"(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

"(2) The General Counsel may—

"(A) investigate alleged unfair labor practices under this chapter,

"(B) file and prosecute complaints under this chapter, and

"(C) exercise such other powers of the Authority as the Authority may prescribe.

"(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

"§ 7105. Powers and duties of the Authority

"(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise pro-

vided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

"(b) The Authority shall adopt an official seal which shall be judicially noticed.

"(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

"(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

"(e) (1) The Authority may delegate to any regional director its authority under this chapter—

"(A) to determine whether a group of employees is an appropriate unit;

"(B) to conduct investigations and to provide for hearings;

"(C) to determine whether a question of representation exists and to direct an election; and

"(D) to supervise or conduct secret ballot elections and certify the results thereof.

"(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

"(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

"(1) the date of the action; or

"(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

"(g) In order to carry out its functions under this chapter, the Authority may—

"(1) hold meetings;

"(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

"(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

"(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

"(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

"§ 7106. Management rights

"(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

"(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

"(2) in accordance with applicable laws—

"(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

"(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

"(C) with respect to filling positions, to make selections for appointments from—

"(i) among properly ranked and certified candidates for promotion; or

"(ii) any other appropriate source; and

"(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

"(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

"(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

"(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

"SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

"§ 7111. Exclusive recognition of labor organizations

"(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

"(b) If a petition is filed with the Authority—

"(1) by any person alleging—

"(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

"(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

"(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

"(c) A labor organization which—

"(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

"(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

"(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

"(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

"(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

"(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

"(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

"(f) Exclusive recognition shall not be accorded to a labor organization—

"(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

"(2) in the case of a petition filed pursuant to subsection (b) (1) (A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

"(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

"(A) the collective bargaining agreement has been in effect for more than 3 years, or

"(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

"(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

"(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation

for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

"§ 7112. Determination of appropriate units for labor organization representation

"(a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

"(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

"(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

"(2) a confidential employee;

"(3) an employee engaged in personnel work in other than a purely clerical capacity;

"(4) an employee engaged in administering the provisions of this chapter;

"(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

"(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

"(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

"(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

"(1) which represents other individuals to whom such provision applies; or

"(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

"(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

"§ 7113. National consultation rights

"(a)(1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organiza-

tion's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

"(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) be permitted reasonable time to present its views and recommendations regarding the changes.

"(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

"§ 7114. Representation rights and duties

"(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the

unit it represents without discrimination and without regard to labor organization membership.

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

"(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

"(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

"(ii) the employee requests representation.

"(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

"(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

"(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

"(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

"(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

"(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

"(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

"(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

"(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

"(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

"§ 7115. Allotments to representatives

"(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the

unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

"(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

"(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

"(2) the employee is suspended or expelled from membership in the exclusive representative.

"(c) (1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

"(2) (A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

"(B) Any agreement under paragraph (1) of this subsection between a labor organization and an

agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

"§ 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

"(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the

agreement was in effect before the date the rule or regulation was prescribed; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

"(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

"(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

"(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an

agency in a labor-management dispute if such picketing interferes with an agency's operations, or

"(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

"(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

"(1) to meet reasonable occupational standards uniformly required for admission, or

"(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

"(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121 (e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance

procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

"(e) The expression of any personal view, argument, opinion or the making of any statement which—

"(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election.

"(2) corrects the record with respect to any false or misleading statement made by any person, or

"(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

"§ 7117. Duty to bargain in good faith; compelling need; duty to consult

"(a) (1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

"(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to mat-

ters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

"(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

"(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

"(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

"(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

"(B) the Authority determines that a compelling need for a rule or regulation does not exist.

"(3) A hearing may be held, in the discretion of the Authority, before a determination is made under

this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

"(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

"(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

"(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

"(A) filing a petition with the Authority; and

"(B) furnishing a copy of the petition to the head of the agency.

"(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

"(A) file with the Authority a statement—

"(i) withdrawing the allegation; or

"(ii) setting forth in full its reasons supporting the allegation; and

"(B) furnish a copy of such statement to the exclusive representative.

"(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

"(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

"(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

"(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

"(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

"(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"§ 7118. Prevention of unfair labor practices

"(a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

"(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

"(A) of the charge;

"(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

"(C) of the time and place fixed for the hearing.

"(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person

or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

"(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

"(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

"(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

"(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

"(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

"(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II

of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

"(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

"(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

"(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

"(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

"(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of

the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

"(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

"(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

"§ 7119. Negotiation impasses; Federal Service Impasses Panel

"(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

"(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

"(1) either party may request the Federal Service Impasses Panel to consider the matter, or

"(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

"(c) (1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

"(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

"(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

"(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is en-

titled to travel expenses as provided under section 5703 of this title.

"(5) (A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

"(i) recommend to the parties procedures for the resolution of the impasse; or

"(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

"(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

"(i) hold hearings;

"(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

"(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

"(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

"§ 7120. Standards of conduct for labor organizations

"(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic

principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

"(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

"(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

"(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

"(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

"(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences

opposed to basic democratic principles if there is reasonable cause to believe that—

"(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

"(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

"(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

"(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

"(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chap-

ter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

"(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

"(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

"(2) take any other appropriate disciplinary action.

"SUBCHAPTER III—GRIEVANCES

"§ 7121. Grievance procedures

"(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

"(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

"(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

"(1) be fair and simple.

"(2) provide for expeditious processing, and

"(3) include procedures that—

"(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

"(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

"(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

"(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

"(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

"(2) retirement, life insurance or health insurance;

"(3) a suspension or removal under section 7532 of this title;

"(4) any examination, certification, or appointment; or

"(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

"(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit System Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

"(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be

deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

"(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

"(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

"§ 7122. Exceptions to arbitral awards

"(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

"(1) because it is contrary to any law, rule, or regulation; or

"(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

"(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

"§ 7123. Judicial review; enforcement

"(a) Any person aggrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement

of any order of the Authority and for appropriate temporary relief or restraining order.

"(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its find-

ings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"§ 7131. Official time

"(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

"(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

"(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

"(d) Except as provided in the preceding subsections of this section—

"(1) any employee representing an exclusive representative, or

"(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

"§ 7132. Subpenas

"(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

"(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

"(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

"(b) In the case of contumacy or failure to obey a subpena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mile-

age allowances which are paid subpenaed witnesses in the courts of the United States.

"§ 7133. Compilation and publication of data

"(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

"(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

"§ 7134. Regulations

"The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

"§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

"(a) Nothing contained in this chapter shall preclude—

"(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

"(2) the renewal, continuation, or initial according of recognition for units of management

officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

"(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter."

BACKPAY IN CASE OF UNFAIR LABOR PRACTICES AND GRIEVANCES

SEC. 702. Section 5596(b) of title 5, United States Code is amended to read as follows:

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

"(i) an amount equal to all or any part of the pay, allowances, or differentials, as

applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

"(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; and

"(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

"(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

"(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

"(2) This subsection does not apply to any reclassification action nor authorize the setting aside

of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

"(3) For the purpose of this subsection, 'grievance' and 'collective bargaining agreement' have the meanings set forth in section 7103 of this title, 'unfair labor practice' means an unfair labor practice described in section 7116 of this title, and 'personnel action' includes the omission or failure to take an action or confer a benefit."